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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1388.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

ADA WARD, WIFE OF CHARLES WARD (FORMERLY ADA DAVEY).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 13, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plaint which was in the said court, before you or some of you, between the Ætna Life Insurance Company of Hartford, Connecticut, and Ada Davy (now Ada Ward), formerly of the city of Jersey City and now of the city of Oswego, New York, of a plea of debt, a manifest error hath intervened, to the great damage of the said The Ætna Life Insurance Company of Hartford, Connecticut, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

1½ Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety.

{ The Seal of the U. S. Circuit Court, Dist. of New Jersey. }

S. D. OLIPHANT, *Clerk.*

Due service of a copy of within citation is hereby admitted.

JNO. LINN,
Attorney for Ada Davey, Defendant in Error.

[Endorsed:] U. S. circuit court, dist. of New Jersey. Ada Davy against Ætna Life Ins. Co. Writ of error. Strong & Mathewson, attorneys for defendant, 45 William St., New York city. Allowed May 19, 1890. Edw. T. Green, J.

2 UNITED STATES OF AMERICA, *ss:*

To Ada Ward, wife of Charles Ward (formerly Ada Davy), of the city of Oswego, Oswego county, New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the third circuit and district of New Jersey, wherein The Ætna Life Insurance Company of Hartford, Connecticut, is plaintiff in error and

you are defendant in error, to show —, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward T. Green, one of the judges of the circuit court of the United States for the district of New Jersey.

Dated May 19, 1890.

EDW. T. GREEN, *J.*

Due service of a copy of within citation is hereby admitted.

Dated May 19, 1890.

JNO. LINN,
Attorney for Ada Davy, Defendant in Error.

2½ [Endorsed:] U. S. circuit court, district of New Jersey. Ada Davy against Ætna Life Ins. Co. Citation. Strang & Mathewson, attorneys for defendant, 45 William St., New York city.

3 Supreme Court of the United States.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *against* ADA DAVY.	On Writ of Error from the United States Circuit Court, District of New Jersey.

Know all men by these presents that we, the Ætna Life Insurance Company of Hartford, Connecticut; Ed. F. C. Young, of Jersey City, Hudson county and State of New Jersey, and Joseph Warren, also of said Jersey City, Hudson county and State of New Jersey, are held firmly bound unto Ada Ward, wife of Charles Ward (formerly Ada Davy), of Oswego, Oswego county, State of New York, in the sum of thirty-five thousand dollars, to be paid to the said Ada Davy, her executors, administrators, or assigns; to which payment, well and truly to be made, do bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this fifth day of May, 1890.

Whereas the above named The Ætna Life Insurance Company of Hartford, Connecticut, are about to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the third circuit and district of New Jersey:

4 Now, therefore, the condition of this obligation is such that if the above-named The Ætna Life Insurance Company of Hartford, Connecticut, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONN.,
By MORGAN G. BULKLEY, *President.*
[L. S.] J. L. ENGLISH, *Sec'y.*
E. F. C. YOUNG. [L. S.]
JOSEPH WARREN. [L. S.]

Signed, sealed, and delivered in the presence of—
FLAVEL McGEE,
As to the last two seals and signatures.

UNITED STATES OF AMERICA, } ss:
State of New Jersey, County of ——, }

Ed. F. C. Young and Joseph Warren, each being duly sworn, depose and say, and each for himself says, that he is worth the sum of thirty-five thousand dollars over and above all his just debts and liabilities, and resides in and owns real estate in the State of New Jersey.

E. F. C. YOUNG.
JOSEPH WARREN.

Subscribed and sworn to before me this sixth day of May, 1890.

[L. S.] FLAVEL McGEE,
Notary Public of New Jersey.

5 STATE OF CONNECTICUT, } ss:
County of Hartford, }

Be it remembered that on the 5th day of May, 1890, before me, the subscriber, a notary public for the State of Connecticut, residing in Hartford, personally appeared Joel L. English, who, being duly sworn according to law, on his oath says that he is the secretary of the Ætna Life Insurance Company, one of the parties named in the foregoing obligation; that he knows the seal of the said company, and that the seal affixed to said obligation is the common or corporate seal of said company; that Morgan G. Bulkley is the president of said company; that this deponent saw the said Morgan G. Bulkley sign, seal, and deliver the said obligation as a voluntary act and deed of the said company, he being thereunto duly authorized by the resolution of the board of directors of said company, and that thereupon this deponent signed his name to the same as an attesting witness.

JOEL L. ENGLISH.

Subscribed and sworn to before me this 5th day of May, 1890.

[L. S.] T. J. GILL,
Notary Public.

STATE OF CONNECTICUT, } ss:
Office of the Secretary, }

I, R. Jay Walsh, secretary of the said State of Connecticut
6 and keeper of the seal thereof, do hereby certify that Thos. J. Gill, Esq., was, on the sixteenth day of January, A. D. 1889, duly appointed and commissioned a notary public in the said State from the date of said commission until the first day of February, A. D. 1891, and that to his acts and attestations as such full faith and credit are and ought to be given in and out of court.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said State, at Hartford, this 5th day of May, A. D. 1890.

R. JAY WALSH, *Secretary.*

(Endorsed:) U. S. Supreme Court. Ætna Life Ins. Co. of Hartford, Conn., against Ada Davy. Bond. Strong & Mathewson, attorneys for insurance Co., 45 William St., New York city. Approved May 19, 1890. Edw. T. Green, J. Filed May 19, 1890. S. D. Oliphant, clerk.

7 *Judgment.*

United States Circuit Court, District of New Jersey.

ADA DAVEY
vs.
THE ÆTNA LIFE INSURANCE COMPANY.

In debt.

As yet of the thirty-first day of December, eighteen hundred and eighty-one.

EDWARD T. GREEN,
District Judge.

Witness:
S. D. OLIPHANT, *Clerk.*
JOHN LINN,
Attorney for Plaintiff.
THERON G. STRONG,
Attorney for Defendant.

DISTRICT OF NEW JERSEY, *ss:*

Ada Davey, who is a citizen of the State of New Jersey, the plaintiff in this suit, by Linn and Babbitt, her attorneys, complains of The Ætna Life Insurance Company, a corporation created by the laws of the State of Connecticut and a citizen of the State of Connecticut, the defendant in this suit, of a plea that said defendant render unto the said plaintiff the sum of twenty thousand dollars, lawful money of the United States of America, which the said defendant to the said plaintiff owes and from her unjustly detains—

For that whereas heretofore, to wit, on the sixteenth day
8 of July, eighteen hundred and seventy-eight, at the city of Hartford, in said State of Connecticut, the said defendants made and executed their certain contract in writing, commonly called a policy of insurance, bearing date the day and year aforesaid, whereby, in consideration of the representations and declarations made to them in the application for the said policy and of the annual premium of two hundred and thirty-three dollars and sixty cents, to be paid to them on or before the sixteenth day of July in each and every year during the continuance of said policy, — did insure the life of William A. Davey for the term of his natural life in the sum of ten thousand dollars, the said sum insured to be paid at the office of said company in Hartford, Connecticut, to his wife, Ada Davey, the plaintiff in this suit, or, in the event of her death before his, to his executors, administrators, or assigns within ninety days after due notice and proof of the death of the said William A. Davey during the continuance of said policy, any portion of the whole premium for the current year remaining unpaid or any other indebtedness to said company on account of said policy being first deducted therefrom.

The said policy was issued and accepted upon the following conditions and agreements therein contained—that is to say:

9 First. The answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted by the insured to be true in all respects; and if this policy has been obtained through any fraud, misrepresentation, or concealment, or by any false statement, then this policy shall be absolutely null and void.

Second. This policy shall not take effect until the advance premium hereon shall have been actually paid during the lifetime of the insured; and if any subsequent premium on this policy be not paid when due, during the lifetime of the said insured, then this policy shall cease and determine (except as hereinafter provided), and this company shall not be liable for the payment of the sum insured herein nor any part thereof, and no premium on this policy shall be considered paid unless a receipt shall be given therefor signed by the president or secretary of the company.

Third. The said insured is, under this policy, freely permitted to reside in any settled portion of the Western Hemisphere lying north of the thirty-second parallel of north latitude at all seasons of the year, and in the United States lying south of said thirty-second parallel, excepting from the first day of July to the first day of November; and in the Eastern Hemisphere lying north of the
10 forty-second parallel of north latitude and west of the fortieth meridian of longitude each from Greenwich at all seasons of the year, and in Italy south of said forty-second parallel, excepting from the first day of July to the first day of November; and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall at any time during the continuance of this policy

pass beyond or be without the foregoing limits, or shall be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of explosive substances, or as an employee in any capacity in service on any sea, river, lake, or other body of water, or upon any railroad; or if he shall enter in any military or naval service, whether voluntarily or otherwise (the militia when not in actual service alone excepted), without the consent of this company, previously given in writing, signed by the president or secretary, in each and every of the foregoing cases; or if he shall commit suicide or die by his own hand, or in consequence of a duel, or in consequence of the violation of any law wherever he may be; or if he shall become so far intemperate as to impair his health or induce delirium tremens, or if his death shall result from injuries received while under the influence of alcoholic liquor, or if he shall be convicted of felony, then in each and every of
11 the foregoing cases this policy shall become and be null and void, except as provided in the eighth section of these conditions.

Fourth. No assignment of this policy shall be valid unless made in writing and attached hereto and a copy thereof furnished said company, and any claim against this company arising under this policy made by any assignee shall be subject to proof of interest.

Fifth. All agreements made by this company are signed by its president or secretary. No other person can alter or waive any of the conditions of this policy or issue permits of any kind or make an agreement binding upon the company.

Sixth. Permits for residence or travel outside of the limits prescribed above or to engage in occupations hereby prohibited may be granted at the option of the company and on payment of extra premiums to be determined by it; which permits must be signed by president or secretary of the company.

Seventh. When all the premiums upon this policy shall have been paid for three years or more and any subsequent premium shall have become due and not have been paid, a paid-up, non-participating policy will be issued for such an amount as the surrender value of this policy will purchase at the then age of the insured, applied as a net single premium by the actuaries' rate of mor-
12 tality and four per cent. interest, provided this policy be surrendered and application made for said paid-up policy within twelve months from the time when said subsequent premium shall have become due and not have been paid; otherwise this policy shall become and be null and void, except as provided in the eighth section of these conditions. No allowance will be made for this policy unless the premiums for three entire years shall have been paid as they become due, nor thereafter except in paid-up insurance, and in determining the amount of the paid-up policy to be issued premiums paid for entire years only will be considered.

Eighth. In every case when this policy shall cease, be, or become void (except by fraud, misrepresentation, concealment, or by any false statement), if the premiums for three entire years shall have been paid, the amount which by the seventh section of these condi-

tions would be applied to the purchase of a paid-up policy shall not be forfeited to the said company, but the same shall be due and payable in ninety days after due notice and proof of death of the said insured.

And the plaintiff saith that the answers, statements, representations, and declarations contained in or endorsed upon the application for said insurance were true in all respects, and the said policy was not obtained by or through any fraud, misrepresentation, or concealment or by any false statement, and the advance premium
13 was actually paid during the lifetime of said William A. Davey, and every subsequent premium on said policy was paid when due during the lifetime of said William A. Davey and receipts regularly and duly given therefor, signed by the secretary of said company, and the said William A. Davey did not at any time during the continuance of said policy pass beyond and was not without the limits prescribed in the third condition mentioned and contained in said policy, and was not at any time engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of explosive substances, or as an employee in any capacity in service on any sea, river, lake, or other body of water or upon any railroad, nor did he at any time enter into any military or naval service, nor did he commit suicide or die by his own hand or in consequence of a duel or in consequence of the violation of any law, nor did he become so far intemperate as to impair his health or induce delirium tremens, nor did his death result from injuries received while under the influence of alcoholic liquor, nor was he convicted of felony, contrary to any of the conditions or agreements contained in said policy.

And the plaintiff further saith that the said William A. Davey departed this life, during the continuance of said policy, on the sixth day of August, eighteen hundred and eighty-one, and that
14 due notice and proof of his said death was given to said defendants on the sixteenth day of August, eighteen hundred and eighty-one.

Whereby and by virtue of the premises the said defendants became indebted to the plaintiff in the sum of ten thousand dollars, parcel of said sum of twenty thousand dollars above demanded, to be paid to her within ninety days after said notice and proof of death of said William A. Davey, which period has long since and before the commencement of this suit elapsed; yet the said defendants, although often requested so to do, have not as yet paid said sum of ten thousand dollars or any part thereof to the said plaintiff, but so to do have hitherto wholly refused and still refuse, to the damage of said plaintiff of ten thousand dollars, and therefore she brings this suit, &c.

And the said defendant, by Theron G. Strong, its attorney, comes and defends the wrong and injury when, &c., and says that it does not owe the said sum of ten thousand dollars above demanded or any part thereof in manner and form as the said plaintiff hath thereof above complained against it; and of this the said defendant puts itself upon the country, &c.

And, for further plea in this behalf to the declaration of the plaintiff, by leave of the court here for that purpose first had and obtained, the said defendant saith that by the first condition
15 and agreement contained in the policy of insurance in the said declaration mentioned, and upon which the said policy was issued and accepted by the said defendant, it was provided and agreed that the answers, statements, representations, and declarations contained in or endorsed upon the application for the said insurance were warranted by the said William A. Davey, the said insured, to be true in all respects, and that if the said policy had been obtained by or through any fraud, misrepresentation, or concealment, or by any false statement, then the said policy shoul be absolutely null and void; and the said defendant avers that a material fact in the answers and statements of the said plaintiff in the application agreed to be the basis of insurance—that is to say, that at the time of issuing the said policy the said William A. Davey had never been addicted to the excessive or intemperate use of any alcoholic stimulants or opium and did not use any of them often or daily—was wholly untrue, and the said William A. Davey had for a long time prior to the issuing of said policy been addicted to the excessive and intemperate use of alcoholic stimulants, and had used them often and daily; wherefore the said defendant says that the said policy became and was absolutely null and void; and of this the said defendant puts itself upon the country, &c.

And, for a further plea in this behalf to the declaration of
16 the plaintiff, by leave of the court here for that purpose first had and obtained, the said defendant saith that the said policy of insurance was obtained through certain misrepresentations and false statements made in the answers, statements, and declarations contained in or endorsed upon the said application of insurance—that is to say, that the said William A. Davey had never been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, and did not use them often or daily, whereas, in fact, the said William A. Davey had been for a long time prior to the issuing of the said policy and then was addicted to the excessive and intemperate use of alcoholic stimulants, and had used them often and daily, whereof the said policy of insurance became and was null and void; and of this the said defendant puts itself upon the country, &c.

And, for a further plea in this behalf to the declaration of the plaintiff, by leave of the court here for that purpose first had and obtained, — that the said plaintiff ought not to have or maintain her aforesaid action thereof against it, because it says that the condition contained in the said policy of insurance and set forth in the said declaration of the plaintiff—that is to say, that if the said William A. Davey, the insured therein mentioned, should become so far intemperate as to impair his health or to induce delirium tremens the said policy should become and be null and void—was broken,
17 and the said William A. Davey, after the issuing of the said policy, did become so far intemperate as greatly to impair his health and to induce delirium tremens, contrary to the tenor and

effect of the said conditions, by reason whereof the said policy of insurance became null and void; and of this the said defendant puts *himself* upon the country, &c.

Therefore let a jury come before the said court at the March term thereof, A. D. eighteen hundred and eighty-two; and the trial of the said cause having been continued from term to term until the March term, A. D. eighteen hundred and eighty-four—

And now, at this day, to wit, the twenty-seventh day of March, A. D. eighteen hundred and eighty-four, come before the said court as well the said plaintiff, by her attorney, as the said defendants, by their attorney; and the jurors of that jury, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath that the said defendants do owe to the said plaintiff the sum of ten thousand dollars within demanded, and they assess the damages of the said plaintiff on the occasion of the detention of that debt, over and above her costs and charges by her about her suit in this behalf expended, to five thousand and thirty-five dollars and for those costs and charges at six cents.

18 Therefore it is considered that the plaintiff do recover against the said defendants her said debt of ten thousand dollars by the jury aforesaid found, and her said damages of five thousand and thirty-five dollars by the jury aforesaid assessed above her costs and charges aforesaid, and the sum of three hundred and ninety-eight dollars and forty cents now here adjudged to her for her said costs and charges; and the said defendants in mercy, &c.

EDW. T. GREEN, *J.*

Judgment signed this second day of April, A. D. eighteen hundred and ninety.

Rule for Substitution.

United States Circuit Court, District of New Jersey.

ADA DAVEY
vs
THE ÆTNA LIFE INSURANCE COMPANY.

In debt.

The partnership heretofore existing between John Linn and Robert O. Babbitt under the firm name of Linn and Babbitt, attorneys of the plaintiffs in the above-stated suit, having been dissolved, it is ordered by the court that John Linn be substituted therein as the attorney of the above-named plaintiff on motion of John Linn, att'y.

Entered February 20, 1883.

S. D. OLIPHANT, *Clerk.*

19 *Bill of Exceptions.* (*Filed April* 2, 1890.)

United States Circuit Court, District of New Jersey.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *ads.* ADA DAVEY.	In Debt. Bill of Exceptions.

Be it remembered that on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety, at a circuit court of the United States in the third circuit in and for the district of New Jersey, before the Honorable Edward T. Green, judge of said court, the issues joined in the above-stated cause between the said parties (*pro ut* the pleadings) came on to be tried by a jury for that purpose impaneled in the presence of John Linn, Esq., attorney, and Cortlandt Parker, Esq., of counsel for the plaintiff, and Theron G. Strong, Esq., attorney, and Hon. J. D. Bedle, of counsel for the defendant.

The names of the parties are set forth in full in the title to this statement and there has been no change.

The jury was drawn and sworn; whereupon the attorney for the plaintiff, after opening the case to the jury, offered and put in evidence the original policy of insurance issued on the life of William A. Davey. The policy bears date on the 16th day of July, 1879, and is for the sum of ten thousand dollars. He also offered in evidence the receipts for the actual premiums up to the time of the
20 death of Mr. Davy, the last receipt being on the 16th day of July, 1881, and the death of Mr. Davey being on the 6th day of August, 1881. Four premiums were paid on said policy, to wit, 1878, 1879, 1880, and 1881.

Thereupon the plaintiff called as a witness in her behalf FRANK DAVEY, who, being duly sworn, testified as follows:

Direct examination by Mr. LINN:

Q. Are you a brother of William A. Davey?
A. I am.
Q. The person mentioned in this policy of insurance, issued by the Ætna Life Insurance Company?
A. Yes, sir.
Q. When did he die?
A. August 6th, 1881.
Q. Where?
A. At Alexandria Bay, New York.
Q. Were you present at the time of his death?
A. I believe I was.

Cross-examination by Mr. STRONG:

Q. Do you wish to be understood that you were present at the time of his death?

A. Not in the room; no, sir.
Q. You didn't see him die?
A. No, sir; I did not.
Q. When did you reach Alexandria Bay?
A. On the 4th of August.
Q. What day was that?
A. Thursday.
Q. What time in the day?
21 A. In the forenoon, about eleven o'clock.
Q. How did you go there?
A. By train.
Q. By train to where?
A. To Clayton.
Q. How did you get from Clayton to Alexandria Bay? What time did you leave New York?
A. Wednesday evening.
Q. What time?
A. I could not say.
Q. Was it earlier than ten o'clock?
A. I don't remember.
Q. Are you sure you got to Alexandria Bay before the afternoon of Thursday?
A. I am.
Q. What made you surer of that than of the time when you left New York?
A. That is what I testified to before.
Q. I want what you are testifying to now. What makes you surer of that fact than of the time you left New York?
A. I don't know.
Q. When did you receive word to come to Alexandria Bay?
A. On Wednesday, the 3d.
Q. How did you receive it?
A. By telegram.
Q. From whom?
A. From the proprietor of the Crossman House.
Q. Where is the telegram?
A. I don't know.
22 Q. You received it on Wednesday, you say?
A. Yes, sir.
Q. And you started Thursday?
A. Yes, sir.
Q. Are you able to tell us more definitely the time that you started? You didn't start Wednesday night?
A. Yes, sir; I started Wednesday.
Q. You received it Wednesday?
A. Yes, sir.
Q. And started Wednesday night?
A. Yes, sir.
Q. Can't you think as to the time that you started?
A. I cannot.
Q. Did you go alone or in company?

A. I went to the Catskills and met Mrs. Davey.
Q. You mean you stopped at the Catskills?
A. Yes, sir.
Q. You got off the train?
A. Yes, sir; and met her there and waited for another train.
Q. Did anybody go with you?
A. No, sir.
Q. Did anybody join you on any part of the route and go with you?
A. Not to my recollection.
Q. How long were you there at Alexandria Bay?
A. Until Sunday afternoon.
Q. That is to say, you were there Thursday, at whatever time you arrived, until Sunday?
A. Yes, sir.
23 Q. When did Mr. Davey die?
A. Saturday afternoon.
Q. Who was attending him?
A. Dr. Rae.
Q. At Alexandria Bay?
A. Yes, sir; Dr. Watson, of Alexandria Bay, was there before we reached him, and after we reached there we telegraphed for Dr. Rae and he came there.
Q. When did Dr. Rae come there?
A. On Friday.
Q. Who was attending him when you got there?
A. Dr. Watson.
Q. Were you in the room all the time from the time you reached there until the time he died?
A. I was not.
Q. Your room was separate—in some other part of the house or near there?
A. An adjoining room.
Q. How long did Dr. Rae stay there?
A. Until Saturday afternoon.
Q. What time did he reach there Friday?
A. Just before noon.
Q. Who were the persons who had charge of Mr. Davey when you reached Alexandria Bay?
A. I do not know.
Q. Did you see persons there?
A. I saw Dr. Watson.
Q. Anybody else?
24 A. I don't remember.
Q. Would you state positively that there was nobody else there?
A. I would not.
Q. After you got there who were the only persons there of your party?
A. Mrs. Davy and her cousin and Dr. Rae.
Q. When did her cousin come there?

A. She reached there Sunday morning.
Q. And he died when?
A. Saturday afternoon.
Q. You remained there until he was taken away from the bay?
A. Yes, sir.
Q. Was his body taken on a boat from Alexandria Bay up to Clayton?
A. It was.
Q. Did you see who carried the body down to the boat? Did you know the people who did it?
A. I did not.

Mr. Strong produced proofs of loss in answer to notice.

Mr. LINN: I call for the affidavit of William A. Stiles.

(Mr. Linn received some papers and commenced reading the affidavit, and the court stated that if there was no dispute about it it was not necessary to read it.)

Mr. Linn offered in evidence the affidavit as to the identity of the party and the affidavit of the sexton.

25 Mr. Bedle objected to the offer of plaintiff's counsel and insisted that the proofs of the loss must be offered as an entirety; that they cannot pick out part of them and put them in and omit part.

The court ruled that if the papers go in at all they must go in as an entirety.

ADA DAVEY sworn in her own behalf.

Direct examination (by Mr. LINN):

Q. William A. Davy was your husband?
A. Yes, sir.
Q. You have since married and your name is now Ward?
A. Yes, sir.
Q. After his death did you at any time call upon the president of the Ætna Life Insurance Company?
A. Yes, sir.
Q. Where?
A. At Hartford, in his office.
Q. In regard to the payment of this?
A. Yes, sir; just after the demand was made.
Q. Just after the three months had expired—about that time?
A. Yes, sir.
Q. What did he say in reference to having received notice and proofs of death and their intention to pay or not to pay?

Objected to on the ground that the evidence is incompetent and as inadmissible against the company for any purpose. Ob-
26 jection overruled. Exception prayed and allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN. [L. S.]

Defendant's counsel also objected upon the further ground that the statement of the intention is incompetent, inadmissible, and irrelevant. Objection overruled. Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN. [L. S.]

A. I asked for the president of the company, Mr. Bulkeley, and I was shown into his private office and saw Mr. Bulkeley, and he told me that he had received proofs and the certificate of death and that he was not satisfied with them, and that he did not intend to pay the policy.

Not cross-examined.

Mr. LINN: Now, in addition to that, we offer all these affidavits as preliminary proofs of the death, in compliance with the requirements of the court, just as they were offered before. It was admitted that they were delivered within the ninety days required by the policy, to wit, August 16, 1881.

Plaintiff rests.

Mr. Strong then opened on the part of the defendant.
The application and policy were then offered in evidence.

27 Dr. L. C. WATSON, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. STRONG:

Q. What is your profession?
A. The practice of medicine and surgery.
Q. How long have you practiced medicine?
A. 24 years.
Q. Are you a graduate of any medical college?
A. Yes, sir.
Q. Which one?
A. The Geneva Medical College, New York.
Q. Have you received any degree; and, if so, what?
A. Yes, sir; I have received the degree of Dr. of medicine.
Q. Do you know William A. Davy?
A. Yes, sir.
Q. Were you sworn upon the last trial of this action?
A. Yes, sir.
Q. Where do you practice medicine?
A. At Alexandria Bay, New York.
Q. How long have you practiced there?
A. 24 years.
Q. Were you at Alexandria Bay in the summer of 1881?
A. Yes, sir.
Q. Did you see William A. Davy there that summer?
A. I did.
Q. Were you called upon to attend him?
A. Yes, sir.

Q. Were you there at the time of his death?

A. I was in Alexandria at the time of his death. Yes, sir.

Q. Where was Mr. Davy when you commenced to attend
28 him; in what house?

A. At the Crossman House.

Q. Do you remember the day of the week you were called upon to attend him?

A. Yes, sir; it was on Wednesday.

Q. What time on Wednesday?

A. Wednesday morning.

Q. Did any one go to Mr. Davy's room with you?

A. Yes, sir; the clerk.

Q. Who was he?

A. Dr. Bruce now.

Q. When you went to the room was anybody there besides Dr. Bruce, who went with him?

A. I think the bell-boy was there.

Q. Now describe to the jury the condition in which you found Mr. Davy when you went into the room.

A. Mr. Davy was sitting upon the side of the bed with his elbows, as I recollect it, resting upon his knees, leaning forward, with the slop bucket in front of him; I think he had been vomiting; he seemed very nervous and tremulous. I asked him to show me his tongue; it was with difficulty that he put it out. I noticed that his tongue was bitten in several places.

Q. Was there any blood?

A. Yes, sir; there was blood upon his hands and his night shirt.

Q. Did you ask him any questions?

A. I asked him what kind of a night he had, and he said he had been having fainting spells during the night.

29 Q. How was his pulse?

A. His pulse was weak and he was bathed in perspiration, as I remember.

Q. What was his condition as to weakness?

A. Very weak and very much prostrated.

Q. You say there was a slop jar there?

A. Yes, sir.

Q. Did you look at the contents of it?

A. Yes, sir; there was blood in the slop jar, and other material.

Q. Did he say anything to you about it; and, if so, what?

A. I noticed when I was looking in the jar—he wanted to know if there was blood in the jar, and I said, Yes; there was blood in the jar. He then told me that he had been cautioned by his family physician, or that he had been drinking freely, and then afterwards told me that he had been cautioned by his family physician that if he persisted in having these times that he would have hemorrhages from his stomach, and they would probably kill him; and he said, There is the blood, and I suppose it is all up with me now. Those are the words he made use of.

Q. Do you consider yourself qualified to express opinions upon medical subjects generally?

A. I am competent maybe to express opinion upon some medical subjects, but I don't want to make myself an expert.

Q. But upon such a subject as we are now dealing with I mean?

A. Yes, sir; I have seen delirium tremens.

Q. Did you form an opinion as to where this blood that you saw in the jar came from?

30 A. Yes, sir; I thought it came from his stomach.

Q. Did he say anything to you what he had been doing during the night? What he had been drinking, if anything?

A. I don't recollect. He said he had been drinking; he had taken some liquor, but he didn't say as to the quantity.

Q. What did he say, if anything, about drinking liquor?

A. He said he had been drinking liquor quite freely for some little time.

Q. Did he say anything about how long?

A. I don't know that there was any specific time. I don't think there was.

Q. As to the number of days?

A. Yes, sir; a number of days.

Q. While you were there talking with Mr. Davy where was he?

A. He was in the Crossman House. In what position do you mean?

Q. In his room?

A. Yes, sir; in his room.

Q. Where in his room?

A. He was sitting upon the side of the bed.

Q. Did you ask him to lie down?

A. I did.

Q. Did you make an examination of him?

A. I tried to get him to lie down; he was rather reluctant about it and didn't care to lie down. After he lay down I examined him—that is, I examined over the abdomen, and found it was quite distended, as though there was a quantity of gas in the bowels,

31 and while he was in that position, lying down, his eyes wandered about the room a little, and all at once he had what I would term an epileptic seizure. He had a spasm.

Q. When you made an examination of the abdomen did he say anything to you whether he had been troubled with any difficulty?

A. Yes, sir; he also said to me that he had had trouble with his liver, and told me that his physician called it cirrhosis.

Q. Now, when he had this epileptic seizure what was the condition of his mind?

A. I don't think he realized much of what was going on at the time; he was unconscious.

Q. What was his condition as to nervousness and excitability during all this time?

A. He was very nervous and excitable.

Q. I am speaking of the whole time.

A. Yes, sir; he was so all the time that I saw him.

Q. How often did you see him?

A. The first day I saw him three or more times.

Q. The first day was Wednesday?
A. Yes, sir.
Q. Did you see him after the first day?
A. Yes, sir; I saw him the next day.
Q. How many times that day?
A. I think three or more times.
Q. What was his condition as to nervousness and excitability at that time?
32 A. About the same as the previous day. I could not see much difference.
Q. Now, what was his condition during each time that you visited him?
A. I don't understand.
Q. After the first day how about these convulsions?
A. He had no more convulsions after the first day, and there was no hemorrhage after the first day.
Q. What about his general condition as to nervousness?
A. He was very nervous.
Q. And how about his limbs and hands; was there any tremulousness about them?
A. Yes, sir; that followed him right through all the time.
Q. How about his eyes?
A. As I stated a moment ago, his eyes wandered about the room.
Q. You did on that particular occasion, but I am speaking of these different occasions.
A. His eyes would wander about the room as if in search of something—I could not think of anything else—resting apparently upon some object, and he would draw the covers of the bed. This was while he was lying down. He would draw the covers over his face to exclude the sight.
Q. Now, Doctor, what, in your opinion, was the matter with Mr. Davy?
A. I think he had nervous irritation.
Q. Caused by what?
A. I judge it was caused by alcoholic stimulant.
33 Q. Is there any other name by which this disease is known?
A. Yes.
Q. What is it?
A. It is known by the name of delirium tremens.
Q. Is that what you thought he had?
A. Yes, sir; I thought he did.
Q. Have you ever been called upon to treat this man before?
A. No, sir.
Q. You had no acquaintance with him?
A. No, sir.
Q. Did you treat him then for delirium tremens?
A. Yes, sir.

Objected to as leading.

Q. What did you treat him for?

A. For this nervous excitability, nervous irritation.
Q. Which you described as what?
A. As delirium tremens.
Q. Were you at Alexandria Bay at the time of his death?
A. Yes, sir.
Q. Did you see him shortly before he died?
A. I think I saw him the morning before he died. I am not positive, though, about that.
Q. Did any other physician see Mr. Davy during this sickness other than Dr. Bruce?
A. Yes, sir.
Q. Who was there?
A. Dr. Rae.

Q. What day did Dr. Rae arrive, if you are able to state?
34 A. My impression is that Dr. Rae arrived upon Thursday night—possibly on Friday morning. I could not say as to that.
Q. After that time who took charge of the case?
A. Dr. Rae had charge of the case after his arrival.
Q. Did you attend with him at all?
A. I was in the room once with Dr. Rae.
Q. At the time you saw Mr. Davy what did you consider his condition as to prospects of recovery?
A. I considered his condition very critical and the prospects of recovery very doubtful.
Q. What improvement was there in respect to his condition as to nervousness and excitability?
A. There was no improvement. I could not discover any improvement as to nervousness and excitability when I saw him.
Q. Now, please state what your opinion is as to whether his health at that time was permanently impaired or not.
A. As I said before, I considered his condition very critical; and, as I said before, the chances of recovery were very doubtful.
Q. What, in your opinion, was the exciting cause of the disease from which he died?
A. I think the exciting cause was due to alcoholic stimulant.
Q. And what was the disease from which he died, in your opinion?
A. That is a pretty hard matter.

(By Governor BEDLE:)

Q. In plain language?
A. I think the man had delirium tremens; but to say that was the only thing that was the matter with him I don't know as to that.

35 (By Mr. STRONG:)

Q. Of course not. Now, as to his sleeping during the time you were there?
A. I don't think he slept during the time I treated him.
Q. As to his eating?
A. His stomach was too irritable for that.

Q. What was the color of the blood you saw in the slop jar?
A. Dark color.
Q. Is there any medical term by which you describe this hemorrhage from the stomach?
A. Yes, sir.
Q. What do you call it?
A. Hœmatemesis.
Q. How is hœmatemesis ordinarily produced?
A. In various ways. An ulcer of the stomach might produce it and a cancer might produce it.
Q. What is the most frequent cause?
A. Poison, or direct injury might produce it.
Q. Have you finished that answer?
A. Yes, sir.
Q. Taking this particular case, by what do you think this hœmatemesis was produced?
A. It was produced by the excessive use of alcoholic stimulants.
Q. I understood you to say that Mr. Davy said that the doctor told him he had cirrhosis?
A. Yes, sir.
Q. Is there a disease known as cirrhosis of the liver?
A. Yes, sir; there is a disease known as cirrhosis of the liver.
36 Q. What is the disease?
A. Chronic inflammation of the connecting tissues of the liver.
Q. Is this cirrhosis ever produced by drinking alcoholic liquor?
A. Yes, sir; that is one of the ways of producing it.
Q. A common or uncommon way?
A. Quite a common way, I believe.
Q. What is the most common cause of cirrhosis of the liver?
A. Supposed to be alcoholic stimulants.
Q. Do you know when Dr. Rae left?
A. Dr. Rae left on Saturday.
Q. When you went into Mr. Davy's room on Wednesday when you called upon him did you see any bottles there?
A. Yes, sir; I saw a bottle there.
Q. Where was it?
A. Upon the stand.
Q. Where was the stand?
A. By the bed.
Q. What kind of a bottle was it?
A. I should call it an ordinary whisky bottle.
Q. Was it full or empty?
A. There was nothing in it.
Q. Can you tell from what you saw there whether liquor had been freely used or not?
A. I think it had been; yes, sir.
Q. What did he tell you as to that, if anything?
A. In substance, I should say the same as I testified to before — that he had been drinking liquor freely.

37 Cross-examination by Mr. LINN:

Q. Did you ever see Mr. Davy to know him before you were called upon to visit him in that illness?

A. No, sir; I was not acquainted with Mr. Davy. I may have seen him, but I didn't know him.

Q. Your attention was never called to him?

A. No, sir.

Q. You never saw him before to recognize him?

A. No, sir.

Q. And then, on that Wednesday morning, you were called in to see him?

A. Yes, sir.

Q. He was in one room of the Crossman House?

A. Yes, sir.

Q. In what story?

A. I think in the upper story.

Q. A single room by itself?

A. Yes, sir.

Q. An unconnecting room?

A. There may have been another door leading into another room. I could not say as to that.

Q. This slop jar which was in front of him and which you say contained blood and other materials—do you know what other materials it contained?

A. It contained some of the materials that came from his stomach. I thought by the smell possibly there might be some liquor in it.

Q. Anything else?

A. Mucus and blood.

38 Q. How much was there in the slop jar?

A. You mean the contents of the slop jar?

Q. Yes, sir.

A. I think a quart or more in the slop jar—that is, the contents of the jar.

Q. Did he tell you at that time that he had a bilious attack?

A. Yes, sir; he did.

Q. Did he tell you that he had taken pills that night?

A. Yes, sir.

Q. Did he say they had operated on the bowels?

A. I think not. I don't recollect about his saying whether they had operated or not; he had taken pills, and that he had a bilious attack.

Q. Did he say anything about having been expossed to the sun, and his head aching, or sun-stroke, or anything of that kind?

A. He made no such remark to me.

Q. Not to your recollection?

A. No, sir.

Q. You said that he said to you that he had been drinking freely for several days?

A. Yes, sir.

Q. Did he say why he had been drinking freely?

A. No, sir.

Q. Did he say that any one had prescribed alcohol for him?

A. I have no recollection of any such conversation.

Q. Do physicians prescribe alcohol to be taken sometimes in quite considerable quantities?

39 Gov. BEDLE: As an abstract question we object to it.

Admitted.

Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. Some do.

Q. For what complaint do they prescribe it?

A. I have heard of it being prescribed in large quantities in cases of bites from rattlesnakes.

Q. Have you ever heard it prescribed in cases of pulmonary diseases?

A. Yes, sir; but in moderate quantities.

Q. Do not physicians sometimes prescribe it in large quantities for pulmonary diseases—that is, direct the patient to take it until he feels the effect of it; not to measure it in quantities, but to take it until the effect is felt upon the system?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. You never do that?

A. No, sir.

Q. And don't know anybody who does that?

A. No, sir; I prescribe it freely in cases of pulmonary consumption.

Q. Had you ever seen a case of cirrhosis of the liver?

A. I may have seen cases of cirrhosis—you mean prior to

40 seeing Mr. Davy?

Q. Yes.

A. I presume I may have seen cases of cirrhosis of the liver.

Q. Did you know it at that time?

A. I hardly think I did at the time.

(By the COURT:)

Q. What is cirrhosis of the liver?

A. It is a hardening of the tissues. It is a chronic inflammation of the connecting tissues of the liver.

(Further cross:)

Q. As the disease progresses does the liver enlarge or become smaller?

A. Smaller.

Q. What is the first effect upon the liver—enlargening it?

A. It would have the tendency—that is, in an acute stage it would have a tendency to enlarge it.

Q. Are there many causes which produce cirrhosis of the liver?

A. Yes, sir; there are various causes which produce it.

Q. One of which is the excessive use of alcoholic stimulants continued for a long time?

A. Yes, sir.

Q. Is cirrhosis of the liver produced ever, to your knowledge, by a single excessive indulgence or the excessive indulgence continued for a week or ten days? Would that produce it?

A. It might bring a little inflammation, but I hardly think it would be true cirrhosis of the liver after that amount of indulgence.

Q. Had you ever prior to that time seen a case of delirium tremens?

41 A. I think I had.

Q. You are not exactly positive about it?

A. I think I had a case of delirium tremens previous to that.

Q. You say that you called upon Mr. Davy on Wednesday morning and went to see him two or three times that day, and you think two or three times the next day, which would be Thursday. Did you see him more than once after Dr. Rae came?

A. I think I saw Mr. Davy twice after Dr. Rae arrived. I am not positive about that. If I saw Mr. Davy upon the morning he died—he died in the afternoon—if I saw him in the morning, Saturday morning, then I must have seen him twice.

Q. But about that you are not certain?

A. No, sir.

Q. Did you and Dr. Rae have a consultation in his presence?

A. No, sir; the talk between Dr. Rae and myself was outside of the room.

Q. Did Mr. Davy continue in this same condition that you found him in from the time you saw him until Dr. Rae came?

A. Well, I would like to understand the question, whether you mean as to his nervousness.

Q. As to his appearance.

A. As to his nervousness and excitability, I think his condition was very much the same. He had no more hemorrhages; he had no more convulsions.

Q. During this time was his mind clear; did he understand what you said to him?

A. You could recollect him.

Q. Did he talk irrational?

42 A. I don't know that he talked at all when he was not spoken to.

Q. But when he was spoken to he would answer?

A. Yes, sir; he would answer.

Q. Properly?

A. Yes, sir; he would answer.

Q. And so far as you saw was not his mind perfectly clear?

A. Not all the time.

Q. How did you form that opinion; what indicated it?

A. As I said in my previous testimony, I felt, by his allowing his eye to wander about the room as if in search of something, that his

mind was at fault, and then by his imagining that he could see something and covering his face with the bed clothes.

Q. How did you know that he was imagining he could see something?

A. Of course I could not tell what was going on in that man's mind, but I imagined it from his conduct.

Q. From his drawing the bed clothes over his eyes?

A. Yes, sir.

Q. His eyes looked around to different places, and from the fact of his eyes wandering from place to place and covering them with the bed clothes?

A. Yes, sir.

Q. Did he continue in that same condition showing, these same symptoms—I mean his eye wandering from place to place and pulling the bed clothes over him—to the time that Dr. Rae came?

43 A. No, sir; I don't think he did; I don't think he had that same condition when Dr. Rae arrived there.

Q. Did he seem to be better then?

A. He seemed to be very nervous and very excitable.

Q. How did he show that nervousness and excitability?

A. As I have described before.

Q. And that continued up to the time when Dr. Rae came?

A. I say I think it continued. The nervousness and excitability occurred up to the time Dr. Rae came.

Q. After Mrs. Davy came?

A. Yes, sir.

Q. And up to the time Dr. Rae came?

A. Yes, sir.

Q. Did you or not tell Mrs. Davy that his sickness, you thought, was not very serious, and that he might be able to be taken away on Saturday of that week?

A. I have no recollection of telling that to Mrs. Davy.

Q. This bottle that was in the room standing on the stand at the foot of the bed was an ordinary black bottle, was it?

A. I think it was; yes, sir; an ordinary whisky bottle, brown or black.

Q. It was not a square white bottle, or don't you recollect?

A. I don't think it was a square or white bottle. I saw a bottle there, and I recollect it as being a dark-colored bottle. I could not tell whether it was square or not.

Q. Did you examine to see whether it had anything in it?

A. I did.

Q. There was nothing in it?

44 A. No, sir.

Q. Now, you have testified here to-day that you examined his abdomen and that you thought it seemed to be distended as though there were gases?

A. Yes, sir.

Q. Did you swear to that on the trial before?

A. I think I did.

Q. Don't you recollect now that you distinctly stated before that you didn't examine his abdomen?

A. I think you will find it in the testimony that I did examine his abdomen.

Q. I have that impression. Did you examine his feet and limbs?

A. I looked at his feet and limbs, but I could not say how they appeared.

Q. Did you form any opinion from what you saw as to the real cause of his sickness and death?

A. I formed my opinion from his nervous condition and from what he and others told me about it.

Q. Then you formed your opinion from what you saw of his condition and from what others told you about what?

A. Yes, sir; about what he had been doing.

Q. Who did you talk to about it?

A. Who had I?

Q. Who did you talk to about it?

A. I talked to Dr. Bruce as he is now, and I think to the
45 attendants, Andrew Duclone and William White, his oarsman, and there might have been other parties to whom I talked.

Q. So that you can't really tell from whom you received the information upon which you base your opinion?

A. Those three parties I know I received information from.

Q. Did you say here just now that he had been vomiting? You said he was on the side of the bed with the slop jar in front of him and blood in the slop jar.

A. Yes, sir; I think that I testified that he had been vomiting?

Q. He told you so?

A. Other parties told me so.

Q. You didn't know that; other parties told you he had been vomiting?

A. Yes, sir.

Q. If he, on the day previous, had had a sun-stroke or something like that, partial sun-stroke, would that in any degree account for any mental disturbance?

A. It might have created a mental disturbance.

Q. Would or not that same thing cause vomiting or might it not be the cause of vomiting?

A. It might possibly cause vomiting.

(By the 6th juror:)

Q. Are you certain it would not cause vomiting if he was affected by the sun?

A. I think it might produce vomiting if affected by the sun.

(Further cross:)

Q. And if vomiting was caused in that way and there was a latent ulcer or cancer of the stomach might not the vomiting de-
46 velop that ulcer or cancer and account for the discharge of blood?

A. He might have extravasation of blood of the cancer or ulcer into the stomach, sufficiently so that he would have vomited it.

Q. Without a post-mortem examination or an autopsy is it possible for any person in the world to say what was the cause of his death?

A. You could form an opinion.

Q. And that is all?

A. That is all.

Q. That opinion might be correct or not be correct, according to circumstances?

A. The circumstances connected with the opinion might have something to do with it.

Q. Did you say that Mr. Davy did not sleep any of the time that you visited him?

A. I don't think Mr. Davy slept while I was treating him.

Q. Might he not have slept when you were not there?

A. If he did, then the attendants did not report correctly to me.

Q. Then what you state now is based upon what the attendants told you?

A. And from the time I saw him. I saw him three or four times the first day and three or four times the next day; three certainly.

Q. You didn't see him in the night time?

A. No, sir; I did not.

Q. You don't know about his having slept during the night,
47 except what you heard from those with him?

A. Those in attendance told me that he hadn't slept.

Q. What time did Mrs. Davy arrive there?

A. Mrs. Davy, I think, arrived Thursday afternoon.

Q. Didn't she arrive Thursday about ten o'clock?

A. I don't think that she could. I don't know where Mrs. Davy was.

Q. You don't recollect when she came there?

A. No, sir; I think she came on Thursday.

Q. Did you see her after her arrival?

A. Yes, sir; I did.

Q. How long had she been — when you saw her? Do you know that?

A. No, sir; I could not state.

Q. Did she have a conference then with you—talk to you about his condition?

A. I think I had a talk with Mrs. Davy. I could not say just when that conversation or conference was.

Q. Can you tell where it was?

A. No, sir.

Q. Did you see him after Mrs. Davy came and before Dr. Rae came?

A. Did I see him after that?

Q. Yes; after she arrived and before Dr. Rae came?

A. Upon Thursday?

Q. Whenever it may have been. Mrs. Davy arrived on Thursday some time?

A. Yes.

Q. Now, did you see Mr. Davy after she came there and
48 before Dr. Rae came? You say you saw him once after Dr. Rae came.

A. I think I did.

Q. Are you quite positive about —?

A. I know that I saw Mr. Davy three or four times on Thursday. I found that so stated in my book.

Q. You stated that in your testimony before, and you have read that testimony over, have you?

A. Yes, sir.

Q. Do you know whether he ate anything from the time you saw him?

A. I don't think he did.

Q. Did he eat anything after Mrs. Davy came? Do you know whether he ate anything after she came?

A. I could not say as to that.

Q. If he did eat and relish his food, would — indicate that he had delirium tremens, or would it be a symptom that he didn't have it?

A. It is a symptom that would indicate that his stomach was in a little better condition than it was when I saw him.

Q. If he ate and relished his food his stomach could not be in as bad a condition as you supposed it was?

A. It was not in quite as bad a condition as when I was there at the time I spoke of.

Q. And if he slept after you saw him, peacefully and quietly, like a man enjoying his slumbers, would that indicate that he had delirium tremens or that he didn't have delirium tremens?

A. If he was sleeping quietly I should say that the nervous
49 irritation had subsided.

Q. What was the condition of Mr. Davy's face—was it bloated any?

A. Yes, sir.

Q. Are you sure of that?

A. I am quite positive about it.

Q. I think you have testified this morning that he said that his physician told him that if he didn't stop drinking, or something to that effect, he would have a hemorrhage of the stomach?

A. That he would have a hemorrhage of the stomach—yes, sir; I testified to that.

Q. In your examination of the former trial this evidence was given—I read from the book, page 90: "What, if anything, did he say to you about his drinking alcoholic liquor? Ans. I don't know that I ever had any conversation with Mr. Davy about his drinking before that at all. Ques. No; at that time. Ans. Just what I have stated—that his family physician had cautioned him in regard to having these little times in drinking; that he might expect, if he persisted in it, that he would have a hemorrhage of the stomach or a hemorrhage—I didn't know that he said stomach, but that he would have a hemorrhage." That was your testimony then. Is it correct?

A. I presume so.

Q. Do you recollect now that he said hemorrhage of the stomach?
A. I think that is what he said—hemorrhage of the stomach.
Q. That is your recollection now?
50 A. Yes, sir; that was the meaning I wished to convey at that time. If you read that over you will find that is the intent.
Q. You said, "I don't know that he said stomach, but that he would have a hemorrhage."
A. Afterwards you will find where I testified that he would have hœmatemesis, or that he would have hœmatemesis.
Q. Did he ever say hœmatemesis?
A. No, sir.
Q. He never used that term?
A. No, sir; his physician did not.
Q. Did Mr. Davy?
A. No, sir; he said stomach.
Q. On your former examination this question was put to you—I read from page 92: "Did he grow better or worse after you commenced to attend him? Ans. Worse. Q. Or remain in about the same condition? Ans. His nervous condition was about the same. I could not say, with the exception that he had no more convulsions; but he seemed to be very nervous." That was correct at that time?
A. In substance it was the same as I have testified here to-day, is it not?
Q. It don't vary very much. I think you testified to-day that after the morning when you first saw him he didn't vomit any more.
A. After the first day I don't think he had any more vomiting spells.
Q. Did you see him vomit any at all?
A. I don't think I did see him vomit.
51 Q. Or any signs of his vomiting?
A. There was the indications; there was what he had vomited.
Q. That was the first time?
A. Yes, sir.
Q. But you didn't see any new signs?
A. Oh, no; not after that.
Q. On page 96 I read a question put to you on the former examination: "Did any of these symptoms that you have mentioned appear in Mr. Davy's case? Ans. I didn't examine Mr. Davy. I made no diagnosis in his case in regard to cirrhosis of the liver. He merely said that he had been suffering from cirrhosis of the liver." That was correct?
A. That was as I testified to-day.
Q. You made no diagnosis?
A. Not with regard to cirrhosis of the liver.
Q. What did you prescribe for him?
A. I prescribed a medicine that would control hemorrhages and to allay nervous irritation.
Q. Just tell us what medicine.

A. I might possibly recollect some of the medicines that I prescribed.

Q. You do not recollect?

A. I presume I prescribed gallic acid.

Q. Is that your recollection?

A. Yes, sir; I think I did; also ergot and opium to allay irritation.

Q. Anything else that you recollect?

A. I think that is about the line of treatment that is marked off.

52 Q. Did you leave these medicines for him or did he have to send for them?

A. I always leave the medicines that I prescribe.

Q. Do you know whether he took it or not?

A. I think he did.

Q. Would or not, in your opinion, the loss of blood which you say he evidently vomited create tremulousness and a shaky condition?

A. It would have a tendency to. I think it would weaken the system.

Q. And have a tendency to produce that condition?

A. Yes, sir; by weakening the system.

Q. I forget whether you testified this morning that a sun-stroke might be the cause of such convulsions. Do you recollect whether you did testify to that—that if he had had a sun-stroke the day previous that that might have been the cause of the convulsions which you saw him have?

A. I don't recollect that I testified that that might be the cause of it.

Q. What do you say now? Might it or not have such effect on the brain as to cause such a convulsion?

A. I believe that a sun-stroke might cause convulsions.

Q. Such as you saw him have?

A. Epileptic in form.

Q. Might or might not such a convulsion come from meningitis, inflammation of the membrane of the brain?

A. Pressure of the brain and spinal column would produce convulsions.

53 Q. Can you say that this convulsion—this condition—was not caused by inflammation of the membrane of the brain or the spinal cord?

A. Can I say it would not?

Q. Yes.

A. I don't know whether it was or that it was not. I can't say.

Q. Does or not cirrhosis of the liver sometimes arise from highly seasoned food?

A. Yes, sir.

Q. Or gout or rheumatism or indigestion or chronic malarial engorgement, and sometimes without any assignable cause whatever?

A. I think the cirrhosis of the liver may be formed from malaria,

from alcoholic stimulants, from syphilis, and from spices—highly seasoned food.

Q. And from gout and rheumatism?

A. I don't know that I ever read of a case of cirrhosis of the liver that was produced by gout.

Q. And if he had cirrhosis of the liver and it was produced by any other cause than the excessive use of alcoholic stimulants would the symptoms be the same as you observed? I mean the vomiting of blood and the loss of blood.

A. He might have had hemorrhage from cirrhosis of the liver, but I don't know as I understand the rest of your question.

Q. Assuming that he had cirrhosis of the liver not produced by the use of alcoholic stimulants, would the symptoms which that disease exhibited from which you diagnosed be the same as though it was caused by alcoholic stimulants?

54 A. I suppose that cirrhosis of the liver that is caused from malaria or from seasickness might have about the same signs that it would have if it was caused by alcoholic stimulant, but in Mr. Davy's case I don't recollect of diagnosing his case in regard to cirrhosis of the liver.

Q. Cirrhosis of the liver, if he had it, would naturally affect the portal vein, so as to cause blood to flow into the stomach?

A. He might get engorgement of the portal vein caused by cirrhosis of the liver.

Q. No matter what the cause of it was?

A. That might be one of the exciting causes to produce cirrhosis of the liver—obstruction to the portal vein.

Q. Can you tell without an autopsy—ascribe hœmatemesis to cirrhosis of the liver?

A. How is that question?

Q. Can you without a post-mortem examination ascribe hœmatemesis as arising from cirrhosis of the liver?

A. I don't think I can.

Q. Do not some men drink all ther lives without developing cirrhosis?

A. Yes, sir,

Q. A great deal, too?

A. Yes, sir.

Q. Did you take his temperature as to the presence of fever?

A. I don't recollect whether I did. I presume I did. I almost always do.

Q. That may be, but if you don't recollect I don't want it. I want what you recollect; nothing more nor less.

55 A. I don't recollect.

(By Mr. PARKER:)

Q. Are not the effects of sun-stroke and of excess in liquor often so alike that they are mistaken one for the other?

A. Yes, sir; I think there are just such mistakes made sometimes.

Redirect:

Q. You have asked a lot of scientific questions here. Did you make as careful an examination as you could into the circumstances surrounding and connected with Mr. Davy's illness so as to form an intelligent opinion as to what was the matter with him?

A. I think I did.

Q. Have you any doubt in your own mind as to what he was suffering from at that time?

A. Not the least particle of doubt.

Q. And what, in common language—ordinary language—do you call that disease that he was suffering from—the ordinary, every-day term?

A. I should call it nervous irritation or delirium tremens.

Q. You have been asked some questions about sun-stroke. Did you see any evidence at all of sun-stroke or hear anything about sun-stroke connected with this illness?

A. I heard nothing said about sun-stroke.

Q. Did you ever hear anything about meningitis or anything said about that?

A. No, sir.

Q. Or any pulmonary difficulty?

A. No, sir.

56 Q. At any time?

A. No, sir.

Q. Either before Mrs. Davy came or after she came?

A. I have no recollection of hearing anything of the kind.

(By Gov. BEDLE:)

Q. What, in common language, is cirrhosis of the liver called?

A. It is called atrophy of the liver.

Q. What other name?

A. Hardening of the liver; shrinking of the liver.

Q. Is it ever called the gin liver?

A. Yes, sir.

Q. The gin-drinker's liver; is it ever known by that name?

A. Yes, sir.

Q. What is your age?

A. 53.

Q. That is all.

EDWARD M. FORD, sworn on the part of the defendant, testified as follows:

Direct examination (by Mr. STRONG):

Q. Have you ever been in the employ of the Ætna Life Insurance Company?

A. Yes, sir.

Q. Were you in their employ in 1881?

A. Yes, sir.

Q. And through the month of August?

A. Yes, sir.

Q. Just look at those papers and see who keeps those blanks and who they are furnished by.

57 A. Those are the regular blanks used at the time I was in their employ; they were used by the company to make proof of loss as we call it. Those were the regular blanks at that time.

Q. Are you able to say whether you received those?

A. I don't know that I can say that, except that all papers at that time came through my hands and were sent to the company.

Q. Is there anything that you can refresh your recollection from on this subject?

A. No, sir; I don't know that there is.

Q. (Showing witness a paper.) Is that entry there in your handwriting?

A. Yes, sir.

Q. Does it enable *it* to refresh your memory?

A. That enables me to know that I received the papers.

Q. And you were then in the employ of the company?

A. Yes, sir.

Q. How long were you in the employ of the company?

A. From 1865 to 1882; yes, and longer than that; up to 1887, nearly, 1886.

Q. Did you send those to the company at Hartford?

A. To the best of my knowledge and belief I did.

Q. Just state what was the ordinary course of business when a claimant wished to secure payment under a death claim under a policy—what was done by the company.

A. In case of a death the claimant, or whoever had charge of the matter, came into our office and we gave him a set of

58 proofs, those being the proper blanks, and we expected to have these all filled out. The only exception we ever made in having papers filled out was in the case of the minister's certificate; at times we will allow them to go by, as sometimes we have Germans and do not care for the ministers.

Q. As to the physician's certificate?

A. We must have that surely; that was the one thing we needed

Q. Were any claims paid until such proofs were furnished?

A. No, sir; not to my knowledge.

Cross-examination by Mr. LINN:

Q. Where was your office at this time in 1881?

A. 165 or 167 Broadway.

Q. You had your office alone there or with some other agent of the company?

A. We had our office alone.

Q. Who?

A. At that time Mr. L. Morton was the manager for the Ætna Life for New York.

Q. And you were in with him?

A. Yes, sir.

Q. In this case some one came to your office and informed you that Mr. Davy was dead, and then you furnished that person with these blanks to be filled up as making proof of death?

A. Yes, sir.

Q. The company wanted these blanks filled up, and that was their requirement, that these blanks should be filled up
59 before they would pay it?

A. Yes, sir; certainly.

Q. You received actual notice of the death before these blanks were given?

A. We received notice, inasmuch as some one came in and asked for the papers, but no official notice. We didn't consider it official notice until we received the papers.

Q. But that was actual notice—some one told you that Mr. Davy was dead?

A. Yes; I might have heard that on the street.

Q. Then you told that person: "Here are these blanks; they must be filled up"?

A. Yes, sir.

Q. And in doing that you acted in behalf of the Ætna Life Insurance Company?

A. Yes, sir.

Q. And when these things came back were they not sent to the company at Hartford?

A. Yes, sir.

(By Mr. PARKER:)

Q. You were the agent of the company for the reception of these things?

A. I was simply acting as deputy for the agent?

Q. You were in the office with the agent?

A. Yes, sir.

(By Mr. LINN:)

Q. Is Mr. Morton living or dead?

A. He died in 1882.

Q. What time in 1882?

A. April 20th, 1882.

60 Dr. FRANK W. BRUCE, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. STRONG:

Q. Where do you reside?

A. Carthage, Jefferson county, N. Y.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been practicing in Carthage?

A. About eight years.

Q. When did you commence studying medicine?

A. 1878 or 1879, between '8 and '9.

Q. Did you know William A. Davy?
A. I saw him several times at Alexandria Bay.
Q. Where did you see him?
A. At the Crossman House.
Q. What was your position there?
A. I was clerk of the Crossman House in the summer of 1881, I think it was.
Q. How did you happen to be clerk there at that time?
A. Well, I was in school; and for six or seven summers, in vacation, I used to spend my summers at Thousand Islands, sometimes in one capacity and sometimes in another.
Q. That is, trying to help yourself out?
A. Yes, sir; spending my vacation and at the same time earning something so that I could go on with my studies again.
Q. What were your duties there?
A. There was another clerk and myself. We had charge
61 of the house under the directions of Mr. Crossman, the proprietor of the hotel.
Q. How about the books?
A. We kept the books together.
Q. And about the bar account?
A. We charged all the bar account.
Q. Did you see Mr. Davy around the hotel?
A. Yes, sir; a few times.
Q. Did you hear of his sickness?
A. Yes, sir; the first morning that it was known it was reported to me.
Q. When did you begin studying medicine?
A. 1878 or 1879. I had read medicine more or less at different times when I was teaching. I taught for several years.
Q. Where?
A. At different places.
Q. You are a married man, are you?
A. Yes, sir.
Q. And you live at Carthage?
—. ——.
Q. What kind of a practice is your practice there?
A. It is a general practice. I am a general practitioner?
Q. Now, when you heard of Mr. Davy's sickness, what did you do?
A. It was reported to me in the morning about eight o'clock. I went to the room and found him in bed; there was blood on his face and hands and some on the bed clothes, and the slop jar with considerable liquid in it of the color of blood was by the bed, and I said, "Mr. Davy, you are ill." He said he had had a bilious
62 attack and had taken some pills the night before and they had made him sick. He had been sick through the night on account of these pills.
Q. Did he say whether he had vomited or not?
A. I don't remember. He said he was sick.
Q. How about his recognizing you or knowing you?
A. I don't remember whether he knew me. I think he was in

his right mind at different times that morning because he talked rationally at different time.

Q. Tell us what took place.

A. After it had been reported to me I went back to the room with the bell-boy, and when I saw that he needed a physician I sent the bell-boy after Dr. Watson, and while he was gone I remained with Mr. Davy—I thought it was best not to leave him alone—and during the time I was there I stood on the opposite side of the room looking out of the window, and all at once I turned around and passed back toward the bed and it seemed to frighten him. He rose right up in bed—sat up in bed; his eyes had a vacant stare, a sort of a glassy look, and he seemed very tremulous and shaky—frightened; that is the first I noticed anything strange in his appearance about him. I said, "Don't be frightened, you know who it is here." He seemed to calm down, and I went up to him and told him to lie down, he would be better in a little while, and he lay down and I remained until the doctor came. The doctor returned with the bell-boy and made an examination of the case and, I think, was preparing his remedies to leave there, and Mr. Davy was
63 taken with a spasm and began to shake, so much so that we had to hold him; the doctor held his hands and I held his limbs, and while he was in this condition the doctor said, This man is going to die; and some time while we were in there he said the man was very sick, very ill, and his family had better be informed.

Q. How about his tongue?

A. Saliva came from the mouth while he was in this spasm, and it was covered with blood, and we noticed afterwards that he had bitten his tongue. We sent for Mrs. Davy right away; sent a telegram. I think she arrived the next morning or next day some time.

Q. You were in the room several times?

A. Out and in several times; I don't know how many.

Q. Now, as to his actions in the room there at different times, what did he do and how did he look? What was his condition?

A. I don't remember any particular thing that he did while he was in this room that we had assigned him. That was a single room. When Mrs. Davy arrived she wished him taken to a larger room, where the ventilation was better, and we took him to another part of the hotel, down a hall, and at different times while he was in that room he seemed to wander, and spoke of a good many imaginary objects, and I remember his speaking of the air being filled with pitch and there being pitch on the bed, and once he complained of a heavy tube resting on the bed, and of such weight that he wanted it removed, and I satisfied him by helping him remove it.

Q. Now, as to other things being on—boots and stockings.

64 A. He complained of having stockings on, and, I think, boots—boots or shoes.

Q. What else did he do?

A. At one time he got out of bed, and I was a little frightened to be left with him. I think I was alone with him at that time, and I

sent for the bell-boy to come and stay with me. I do not remember now any other things particularly.

Q. Let me call your attention to one thing—about getting up out of bed to go down-stairs.

A. I just said he got up.

Q. You did not tell us about it. Did he say anything about going down-stairs?

A. I don't remember now about his saying anything about going down-stairs, but he got up out of bed. He did get out of bed; I remember that. I remember sending for the bell-boy to help me.

(By the COURT:)

Q. You mean he refused to go back to bed when you asked him?

A. He was wandering in his mind. He wanted to get up and wander around, and I sent for this bell-boy. I was a little frightened. He was wandering in his mind. Part of the time he appeared to be rational and part not.

(Further direct:)

Q. You saw him in all how many times and how long?

A. I could not say how many times, but I know I was back and forth, as I was all over the house every little while, from one place to another.

Q. During how many days of the time he was sick—you
65 say you saw him first on Wednesday morning?

A. Well, he was taken ill; I probably saw him more times before Mrs. Davy came than after, because I thought there was some one to look after him after that.

Q. Did you see him after she came?

A. Yes, sir; several times; but not so many times.

Q. Did you see him every day during his sickness?

A. I don't know; at the last——

Q. He died on Saturday, and he was taken sick on Wednesday?

A. I don't think I saw him after he died; whether I saw him Friday I would not be positive. I think I did see him every day; I know I saw him a great many times.

Q. Have you any experience in your practice of cases of excessive alcoholism?

A. Yes, sir.

Q. Several?

A. Yes, sir; I have had several cases.

Q. In your practice?

A. Yes, sir.

Q. Have you treated them medically?

A. Yes, sir.

Q. How many times did you see these manifestations, of which you have spoken, pitch and smoke in the air?

A. I don't know how many times; he complained of it more than once.

Q. Do you consider yourself competent to express an opin-
66 ion as to what he was suffering from at that time?

A. Yes, sir.

Q. What would you call the disease?

A. I should say he was suffering from delirium tremens.

Q. You say you have had some cases of excessive alcoholism; do you recall the symptoms which they manifested, those cases that you have attended medically?

A. Yes, sir.

Cross-examination by Mr. LINN:

Q. Do you recollect now what morning of the week it was that you was called to see Mr. Davy?

A. If I hadn't heard it here I could not tell.

Q. Do you recollect when, after that, Mrs. Davy came?

A. I remember it was the next day; I think it was.

Q. Do you know how long Mr. Davy had been at the house that summer at that time?

A. No, sir.

Q. Did you ever talk with him?

A. Yes, sir; I have once, that I remember about.

Q. After Mrs. Davy came, which was the next day, how long before he was removed into another room on the same floor?

A. I think it was the same day; right away, as I remember.

Q. When he was removed into the other room was it a single room or were they connecting rooms?

A. It was a much larger room; I think it was what they call a double room, as I remember now.

Q. Now, these indications which you observed of aberration of mind in his imagining smoke and pitch in the air occurred after Mrs. Davy came, I understand, and after he had been
67 removed into the other room?

A. It occurred, as I remember now, after he was taken into the other room.

Q. Did any one come with Mrs. Davy?

A. I don't remember. I don't know.

Q. You don't remember seeing any one with her?

A. The first I remember Mrs. Davy was at his room.

Q. Before he had been removed or after?

A. Just about that time she arrived.

Q. Do you recollect seeing any one there with her after he was removed into the other room?

A. I do not. I don't remember.

Q. At no time whatever?

A. Mr. Davy's brother was there. I recollect him. He had the business to settle, and settled the bill when he went away and paid me.

Q. Do you recollect seeing him about the room into which he was removed?

A. I don't remember as I saw him in there.

Q. Do you recollect seeing Mrs. Davy in the room after he had been removed?

A. Yes, sir; I saw Mrs. Davy in the room.

Q. Your business called you to be about the house all over—to work generally after anything?

A. More particularly I was in the office; but at the time Mr. Davy was ill we tried to make it as comfortable as we could for him. Mr. Crossman directed me to look after him. That is the reason I remember seeing him a great many times.

Q. After Mrs. Davy came and her brother-in-law was with him he was there to look after things?

68 A. Yes, sir

Q. It didn't require you?

A. No, sir. I said I didn't see him many times after that.

Q. Are you quite certain that you saw these symptoms in the room after he had been removed and Mrs. Davy was there?

A. In the second room?

Q. Yes.

A. Yes, sir.

Q. Was Mrs. Davy present at any of those times?

A. I would not say. She might have been there and she might not.

Q. Do you recollect of anybody being in the room?

A. I think there were other people there, but I don't know who they were. I don't remember now.

Q. Did Mr. Davy tell you that morning—I think you testified to that already—that he had been taking pills?

A. Yes, sir.

Q. Do you know whether they had operated upon his bowels or not?

A. No, sir; I do not. I judge so.

Q. Did he attribute his sickness, his vomiting, to the pills that he had taken?

A. He attributed his illness to the pills he had taken.

Q. He said he had a bilious attack?

A. Yes, sir; and taken some pills the night before and they made him sick.

Q. Now, you have described this tremulousness and this exhaustion. Suppose he was very weak when he came there sick,

69 and that he had been out the day before in the sun, and that he had had a partial sun-stroke, would or not that sun-stroke or partial sun-stroke, in his weak, debilitated condition, have produced the same symptoms which you observed—mental aberration and vomiting?

A. I should not look for those symptoms.

Q. Can you say they would not result from such a condition?

A. It would depend upon the history of the case. In a diagnosis you have to depend upon a good many things.

Q. You didn't diagnose that case at all, did you?

A. No, sir.

Q. You had no occasion to do it?

A. No, sir; it was not my business to.

Q. Can you now say from your experience which you have had

since that time that the same symptoms which you then observed might not be produced by partial sun-stroke?

A. If I should see a man suffer as he suffered I would not call it sun-stroke.

Q. Can you say that the same symptoms which you then observed might not be produced by partial sun-stroke?

A. No, sir; I don't think they could.

Q. Can you say that they would not?

A. I don't think that the same symptoms would have been produced by sun-stroke that I observed then.

Q. Would vomiting be produced by sun-stroke?

A. Yes, sir; it might be.

Q. Aberration of mind would be produced by sun-stroke?

A. Yes, sir.

Q. Those were two of the symptoms you saw?

A. Yes, sir; I saw those two.

Q. Might or might not the severe vomiting have produced the bleeding which occurred?

A. Yes, sir.

Q. Why, then, might not the sun-stroke—if that had pro-
70 duced the aberration of mind, and the vomiting had resulted in a loss of blood, why might not that thing occur in a case of sun-stroke?

A. As I said before, the history of the case, taken with the symptoms that we observed, might change your opinion; you might have several symptoms that would be similar; still the history connected with the case has something to do with it. I charged two pint bottles of liquor to that man the night before.

Q. Did you testify to that before?

A. I don't know that I did.

Q. The night before. Do you know what day of the week it was?

A. No, sir; but I remember that at the time I had charged two bottles.

Q. When did you first remember that since that time?

A. I thought of it that morning; the bottles were there.

Q. You never have testified to that before here?

A. I don't know that I have; nobody has ever asked me. I don't know that I ever told you.

Q. You were asked about bottles before, were you not?

A. I don't know that I have been.

Q. Do you know what became of those bottles?

A. No, sir.

Q. Do you know whether they were given to William White or not?

A. No, sir.

Q. You don't know what became of the bottles at all?

A. No, sir.

Q. You have taken that into account in forming your
71 opinion as to what was the cause of his sickness?

A. I suppose that he drank it; that is all I know about it.

Q. You have taken that into account in forming your opinion?

A. Yes, sir; that is part of the history that any man will take into account.

Q. That is your idea, of course. Have you ever known a person who was suffering from pulmonary trouble who in consequence of it was very much debilitated, and as a result of that, without any other cause, became delirous before death, exhibited such symptoms as you have stated here?

A. Yes, sir.

Q. Well, then, suffering from pulmonary complaint might have produced possibly the same symptoms which you have observed here?

A. It might have produced this deranged state of mind somewhat.

Q. And, if there was a loss of blood, the other symptom?

A. It is so arranged that nearly every one who dies does not have his right mind. They are very apt to show the symptoms that this man did.

Q. Just at the moment of death?

A. Yes, sir; and sometimes before.

Q. Sometimes some days before?

A. Yes, sir.

Q. Where were you educated—at what college of medicine?

A. At the university, New York city.

Q. When did you graduate?

A. In March, 1882.

Q. And have been practicing since that in Carthage, N. Y.?

A. Yes, sir.

72 Redirect:

Q. Do you remember what kind of liquors it was that you charged to him?

A. I would not positively say.

Q. What is your best recollection about it?

A. I don't know that I would like to say what the liquor was. I could give my impression.

Q. Give your best recollection about it, whatever it is.

A. I think one was a bottle of gin, and the other I don't know—I don't remember.

(By a juror:)

Q. Do you know what he was in the habit of getting.

A. No, sir; I was not the bartender. The bartender sent the checks to us—so many bottles. Sometimes the name was on the check and sometimes not.

(Further redirect:)

Q. Just answer the question, whether it was spirituous liquor like gin, brandy, whisky, or rum, or light liquors.

A. I don't know that that was marked on the checks; usually it was so many drinks.

Q. Passing that question, if you don't remember what kind it was, did you ever hear of any sun-stroke in connection with Mr. Davy?

A. Not until I came to this court.

Q. Did you ever hear of any pulmonary difficulty connected with him?

A. I have not until I was called here.

Q. From the experience that you have had have you any doubt in your mind as to what this man was suffering from?

73 A. No, sir.

Q. What do you call the disease?

A. Delirium tremens.

Further recross:

Q. I don't understand that you sold this man any liquor?

A. I was not the bartender.

Q. You did not sell him any liquor?

A. I charged the checks.

Q. You did not sell him any liquor—did you or not?

A. May I ask what I am to understand by "selling liquor"?

Q. Were you standing somewhere or going with a bottle somewhere selling it to the man?

A. No, sir; I did not tend bar, and I did not carry it to him.

Q. You did not do it?

A. No, sir.

Q. And you did not see it done?

A. Everything passes by the office.

Q. Can't you answer my question? Did you see it done; did you stand by and see the liquor sold to the man?

A. No, sir; I never saw him drink liquor.

Q. All you know, as I understand it, is that somebody else whom you call the bartender gave you a slip of paper which said something, and that something you put in a book; that is the whole of it?

A. That something was so many drinks.

Q. You have no knowledge except what you derived from the say-so of somebody else on this slip of paper?

A. What I charged.

Q. You have no knowledge?

74 A. All the knowledge I have is what I charged.

Q. And yet you come here to tell us that you know of his having obtained two bottles of liquors?

A. May I ask what I said? I said I charged him.

Q. But you know what that conveyed, that you sold it and charged it?

A. Charged it.

Q. Didn't you know that you had conveyed the thought of having sold it as well as charged it?

A. I was the clerk of the hotel and charged the bills.

(By Gov. BEDLE:)

Q. Just one question; that charging was done in the regular course of business, was it not?

A. Yes, sir.

Mr. Strong informed the court that the depositions of Gifford Benson, William Comstock, Theodore Lear, Louis Duryea, Andrew C. Duclone, Charles M. Crossman, Oliver J. Sykes, and Cyrus Dale had been taken in the State of New York before a commissioner prior to the last trial and had been read in evidence thereupon, and he proceeded to read the testimony so taken as evidence on this trial.

75 GIFFORD BENSON, a witness called in behalf of the defendant, being duly sworn, testified on direct examination as follows:

By Mr. STRONG:

Q. Where do you reside, Mr. Benson?
A. Alexandria Bay, Jefferson county, N. Y.
Q. What is your business?
A. I am an oarsman.
Q. You have occupied an official position, have you not?
A. Yes; I am policeman of the town.
Q. You were at one time collector of taxes, were you not?
A. Yes, sir.
Q. Did you keep a restaurant on Pine Island?
A. I did.
Q. How long did you keep it?
A. Eight years.
Q. When did you give it up?
A. In '80, fall of '80, October, '80.
Q. Did you know William A. Davey?
A. I did, sir.
Q. When did you become acquainted with him?
A. I think it was in '74. I am not positive as to the date, but I think in '74.
Q. Did you have a bar on Pine Island?
A. I did.
Q. See Mr. Davey there?
A. Yes, sir.
Q. How often?
A. Sometimes he would be there once a month, and sometimes once or twice a week to the best of my recollection.
Q. Sometimes oftener than once or twice a week, wasn't he, as often as three or four times a week?
A. It is a long time ago and positively I couldn't say; he might have been there three or four times a week, but I don't think it exceeded more than three.

76 Q. How long did he stay there?
A. Sometimes he would stay a few minutes and sometimes he would stay two or three hours.
Q. Did he purchase any liquor there?
A. He did.
Q. What?
A. Brandy.

Q. Was this true during one year or several years that he came to your place at Pine Island and purchased brandy?

A. Well, he was there at different times; I am not positive as to any dates but 1880.

Q. Did he drink at the bar?

A. He did.

Q. What time did he come there usually?

A. Generally eight or nine or ten o'clock; somewheres along there.

Q. Did he sometimes stay to dinner?

A. I don't think he ever did; positively I couldn't say, but to my remembrance I don't think he ever was there to dinner.

Q. Did he drink more than once there when he stopped?

A. If he only stopped for a few minutes he would only drink once; if he stayed there two or three hours he would drink more than once.

Q. What was the longest stay that you know of?

A. I couldn't positively say, but I think three or four hours.

Q. How often did he drink during that time?

A. Once an hour or something like that; I couldn't say positively.

Q. But your best recollection?

A. My best recollection is once an hour.

Q. Did you tend the bar there yourself?

A. I did, sir.

Q. Did he buy bottles of brandy there?

A. He did.

Q. How often?

A. Sometimes he would buy a bottle and sometimes he would not; there were times he came he would not buy a bottle.

Q. How was it generally?

A. I should think the majority of times he would take a bottle away with him; buy a bottle.

Q. Did he take the bottles away with him?

A. Yes, sir.

Q. He did not drink there from the bottles of brandy that he purchased?

A. No, sir; he did not.

Q. As I understand it he drank at the bar?

A. Yes, sir; what drinking he did at my place to the best of my recollection he did at the bar.

Q. Did he always buy brandy and always drink brandy?

A. He did.

Q. What kind of brandy did he buy?

A. Hennessey & Martell.

Q. With whom did he come?

A. With his guide or boatman.

Q. What year was it that he began to come there?

A. I couldn't positively say, but I think in '74.

Q. Was there any difference in his habit of drinking from the time that he first came there and afterwards, as to his drinking more the latter part of his coming there?

A. I could not say that there was; he might have drank more the latter part of his coming there, but I am not positive.

77 Cross-examination by Mr. LINN:

Q. At the time Mr. Davey was in the habit of coming to your place, was he a guest at one of the hotels at Alexandria Bay?

A. I understood he was a guest at the Crossman House.

Q. Do you know whether any friends of his, companions, were with him, who came from Jersey City where he then lived?

A. I don't think there was; I am not positive, but I don't think he ever came there with any of his friends; no one except his boatman or guide.

Q. This place that you kept was in the Dominion of Canada?

A. Yes, sir.

Q. And did you sell good brandy cheaper than it could be bought on this side of the river?

A. I did.

Q. Others came there also at times to buy brandy from this place?

A. Yes, sir; there was where I derived my trade, from the guests at the hotels and the islands here.

Q. Do you know whether Mr. Davey ever complained of his lungs being affected, or that he was afraid they would be, and that his physician directed him to use stimulants?

A. I never did, sir.

Q. Never heard him say so?

A. No, sir.

Redirect examination:

Q. How far was your place from the Crossman House?

A. A mile and three-quarters.

Q. What boatman did Mr. Davey have in 1880?

A. Lewis Dereyaw.

Deposition of William Comstock, taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Alexandria Bay, New York.

WILLIAM COMSTOCK, a witness called in behalf of the defendant, being duly sworn, testified on direct examination, as follows:

By Mr. STRONG:

Q. Where do you reside?

A. Alexandria Bay.

Q. In the summer time what are you engaged at?

A. Boating and rowing.

Q. In 1881, and for several years previous, where were your headquarters for engaging parties?

A. At the Crossman House; I was three seasons there at the Crossman House; that was my headquarters.

Q. Was that your headquarters in 1881?
A. Yes, sir.
Q. Did you ever know William A. Davey?
A. Yes, sir.
Q. How long have you known him?
A. Well, it was several years; I should think three or four or five, something like that, perhaps more.
Q. Since what time, 1876 or 1877?
A. 1881 was the last year, I think, to the best of my judgment.
78 Q. And you had known him several years previously?
A. Yes, sir.
Q. Since 1876 or 1877?
A. Yes, sir.
Q. During those years to the best of your recollection, how long did you see him in the summer time?
A. To the best of my judgment I could say two months in the summer.
Q. Where did he stop?
A. Crossman House.
Q. Were you personally acquainted with him?
A. Only the time that I specified.
Q. You were personally acquainted with him?
A. Yes, sir.
Q. In what part of the house did you see him, if you saw him, in the evening, what rooms?
A. In the billiard-room and the bar-room.
Q. How often, every evening?
A. I think it was about every evening, excepting one or two that I was absent.
Q. Did you observe his practice with respect to drinking liquors in 1881?
A. You ask me if I saw him drink, do you mean.
Q. Yes.
A. Yes, sir.
Q. When was it?
A. It was that last summer he died.
Q. Did you see him evenings?
A. Well, sometimes, yes in the evening and day-time.
Q. Now, about what time, if you know, did he come down to the bar-room?
A. I could not state the time, but it was in the evening, fore part of the evening.
Q. How about the hours?
A. From dark to 9 o'clock or 10 or half past nine, somewhere there; I can't exactly say.
Q. Did you notice what time he returned from being out on the river?
A. I could not remember that exactly, it was different times.
Q. From the time that he came down to the bar-room and the billiard-room as you have testified, how long did he stay there?

A. I don't understand you, how long did he stay, do you mean at one time?

Q. Usually in the evening?

A. I have seen him stay there a little while and go out, and then come in again; I can't tell exactly.

Q. But going out and in and being about there, how long was he around there, up to what hour from the time that he came down?

A. From nine to not over ten, because I never to used to stay later than that.

Q. Did you see him drink liquor while he was there?

A. Yes, sir.

Q. Did you drink with him once or twice?

A. Yes, sir.

Q. Did you observe what he drank?

A. Liquor.

Q. Did you observe what kind of liquor it was?

A. No, sir, not at the bar; I couldn't tell what kind of liquor it was.

Q. It was not wine, was it?

A. No, sir; not as I should call it.

Q. Did you see him call up the boatmen to drink with him?

A. Yes, sir.

79 Q. How many of them?

A. To the best of my recollection from 4 to 6 or 8. I couldn't remember exactly.

Q. How often did he do that?

A. I couldn't tell you how many times nor how often.

Q. Give your best recollection?

A. I should say, to the best of my recollection, perhaps three times a week.

Q. At other times did you see him drinking with any persons, and if so, with whom?

A. Yes; I couldn't tell who, but it seemed to be a gentleman stopping there that he was acquainted with.

Q. And did you see him drink alone?

A. Yes, sir.

Q. How often did he drink at the bar during the time that you saw him each day in the bar-room and billiard-room, to the best of your recollection?

A. Sometimes it would be an hour, and sometimes it would be half a day perhaps.

Q. About?

A. I couldn't remember exactly.

Q. An average of about how often?

A. I couldn't average that; some days I would see him several times.

Q. Didn't he in your judgment, drink at least every three-quarters of an hour during the time that you saw him there?

A. There was times I saw him drink with three-quarters of an hour between, others longer, but what he drank I could not say.

Q. Was it, or was it not his practice on each evening when you

saw him, with not more than four exceptions, to drink every three-quarters of an hour?

A. Yes, sir.

Q. Was this so during his stay in 1881, in July and August?

A. Whenever I saw him.

Q. I have asked you some questions, and now I am asking, and all I have asked you, relate to July and August, '81; do you refer to July and August, 1881?

A. Yes, sir.

Q. In other years, previous to 1881, was his practice of drinking any different at all?

A. Before 1881?

Q. Yes.

A. Not so much as then, sir.

Q. Were you at Alexandria Bay when he died?

A. Yes, sir.

Q. How long was he taken sick before he died, to the best of your recollection?

A. To the best of my recollection, sir, it would be 3 or 4 weeks.

Q. Do you wish to be understood that he was taken sick 3 or 4 weeks before he died?

A. No, sir.

Q. Do you remember how long he was taken sick before he died?

A. The best of my judgment would be six weeks, sir.

Q. Taken sick?

A. From the time he was taken sick, that is he was ill, but what I mean to be down——

Q. I mean confined to his room?

A. If you put it that way I know what to answer you.

Q. How long was he confined to his room?

A. Three weeks.

Q. You think he was confined to his room three weeks do you?

A. Pretty nigh it.

Q. Do you know who was his nurse?

A. One of them was Andrew Duclon.

80 Q. Did you go up to Davey's room at anybody's request?

A. Yes, sir.

Q. At whose request?

A. Andrew Duclon, I think that was the man who took care of him at that time.

Q. In what condition did you find Davey when you went up there?

A. Laying on the bed.

Q. What was his condition?

A. He seemed to be very sick.

Q. How was it as to his being nervous and excited?

A. He seemed to be nervous and excited.

Q. How was it as to his being out of his mind?

A. I thought he did not have his right mind.

Q. Did you do anything to restrain him?

A. Merely went up and talked with him, put our hands on him and talked with him.

Q. Did you or not, use force with him to prevent him from going down-stairs and to keep him quiet?

A. I did not.

Q. Did you see force used?

A. Andrew Duclon took hold of him.

Q. When you went into the room, who did you find there?

A. Andrew Duclon.

Q. And Mr. Davey?

A. Yes, sir.

Q. What was his conduct there as to moving his hands and feet, and in regard to his statements and exclamations, if any?

A. I couldn't make the motions myself, but he seemed to be nervous some way, and very ill.

Q. Was he moving his hands and feet?

A. His hands he was moving.

Q. How, raising them up and down, or how?

A. Yes, something of that kind; he raised up his hands and kind of called for cigars, I think; yes, cigars; that was it, or a box of cigars.

Q. Did you hear him make statements, cry out and make exclamations?

A. He raised up his hands and said, "I want a box of cigars," and Andrew Duclon reached him the cigars in a box.

Q. What did he do?

A. He asked Andrew Duclon if he would have a cigar, and Andrew said, "No, thank you, I don't care for one," and he asked me the same and I said, "No, thank you, I don't wish for any now, some other time, thanks."

Q. What did he do with the box then?

A. Threw it on the floor.

Q. What did you do as to taking it up?

A. I took up the cigars and put them in the box and set them down.

Q. Did he then offer them again?

A. Not that I remember.

Q. Did he not offer them again and upon your saying you did not care for them, take a handful and throw them on the floor?

A. I think it was the box that he threw on the floor, that is my best judgment, that it was the box.

Q. Did you see a bottle of liquor in the room?

A. I saw a bottle sitting on the table.

Q. A bottle of liquor?

A. It looked like liquor to me.

Q. Was it full, or what was its condition?

A. I should think the bottle was about half full.

81 Q. Did you not hear him ask Duclon why he could not have another drink?

A. Yes, sir.

Q. Tell us now what he said about that?

A. He says, "Andrew, I want a drink," or "another drink," I can't remember how he spoke it, but a drink. Andrew says, "No, I think you had better lay down a little while and you will feel better."

Q. That was all?

A. Yes, sir.

Q. Did you see him again in the room?

A. Yes, sir.

Q. Were you in the room again?

A. No, sir.

Q. Where were you then?

A. I passed through the hall by the door.

Q. How long were you in the room during this time that you have spoken of?

A. My best judgment would be half an hour.

Q. Did you see him drink at the bar in the morning before breakfast?

A. I don't know what time they had their breakfast there exactly.

Q. Did you see him drink at the bar in the morning?

A. Before 9 o'clock—do you call that morning?

Q. Yes.

A. Yes, sir.

Q. When you saw him in his room did or did not his actions and his language and his appearance indicate to you that he was under the influence of liquor?

A. Well, sir, that would be something that I could not exactly answer, because he might or might not.

Q. I want to have you answer the question whether or not his language and actions and appearance, when you saw him in the room, indicated to you that he was under the influence of liquor?

A. I should say he was.

Q. Please state whether or not on the majority of occasions when you saw him, he appeared to you to be under the influence of liquor to a considerable extent?

A. Sometimes.

Q. On the majority of occasions, your best recollection?

A. I knew he was at times——

Q. On the majority of occasions, did or did not his appearance indicate to you that he was under the influence of liquor?

A. I can't remember the majority, but I know that I thought he was under the influence of it.

Q. There was more than one occasion?

A. Yes, sir.

Q. On many occasions?

A. Well, I couldn't tell how many times.

Q. I don't want on how many times, but on many occasions—several occasions?

A. Yes, sir; more than once or twice or three times.

Q. Wasn't it so in the majority of occasions when you saw him

that his appearance indicated to you that he was under the influence of liquor?

A. I recollect a number of times.

Q. Is that your recollection of it; majority of occasions?

A. To the best of my knowledge, I should say yes.

Q. Do you wish to make any change as to the time that he was taken sick, and by that I refer to his being confined to his room; if so, just state the fact?

A. Yes, sir; I should say about a week; that is, nigher, I should think to his bed.

82 Cross-examination by Mr. LINN:

Q. You now think that Mr. Davey was confined to his bed a week before he died?

A. To the best of my judgment.

Q. Is that according to your recollection; do you recollect that he was confined to his bed a week before he died?

A. I said it was to the best of my recollection.

Q. How long before he died was it that you were called to his room?

A. I think it was two days, sir.

Q. Were any of his friends here with him then?

A. At what time, sir?

Q. At the time you were called to his room?

A. I don't know; I didn't see them at that time.

Q. Did you see any of them afterwards?

A. Yes, sir.

Q. Who did you see?

A. I think that is the lady there, Mrs. Davey, his wife.

Q. Anybody else?

A. I couldn't remember, sir.

Q. How long was that after you had been called to his room?

A. I think it was the next day.

Q. How long after that was it before he died?

A. I do not understand you.

Q. How long after you saw Mrs. Davey here, was it before he died?

A. I think it was, the best of my judgment, less than twenty-four hours.

Q. When did your acquaintance with Mr. Davey commence?

A. I couldn't remember the exact time, it was four or five years before he died.

Q. In what year did it commence?

A. I couldn't remember exactly; my memory is quite poor, and I can't remember days and dates.

Q. Were you ever engaged by him to row his boat, or do anything for him?

A. I don't think I did, I can't remember anything.

Q. What years did you make the Crossman House your headquarters for engaging in your business of boating?

A. All my lifetime excepting 14 years.
Q. Excepting which 14 years?
A. That was before '64, before 1864, I was away 14 years.
Q. Then from 1864 to 1881 you were engaged at the Crossman House, or made that your headquarters?
A. Yes, here and to Clayton, but here was my headquarters; I worked in both places.
Q. How old are you?
A. I was 48 the second day of this month.
Q. During all of your lifetime, with the exception of 14 years, you have been engaged in boating?
A. Since I have been large enough to boat it.
Q. During which years did you make the Crossman House your headquarters for engaging in the business of boating?
A. Summer seasons.
Q. But during which summer seasons, the summer seasons
83 of which years?
A. Every year but the 14 I told you; every season since I have been big enough.
Q. Every season, then, with the exception of 14 years previous to '64 you made your headquarters at the Crossman House for engaging in your business of boating?
A. I mean this village; I didn't live there, didn't board there.
Q. During what years did you make the Crossman House your headquarters for engaging parties, can you tell?
A. I was about 15 years old when I commenced; I can't remember the years or dates.
Q. Can you tell during which summer seasons, or during the summer seasons of what year, you made the Crossman House your headquarters for engaging parties?
A. Any years do you mean?
Q. Yes, any years you choose to tell?
A. Well, before '64.
Q. Did you make the Crossman House your headquarters for engaging parties after '64?
A. Yes, sir.
Q. When after '64?
A. About every season.
Q. Every year since '64?
A. I don't know as I have been absent a year since '61.
Q. Then I understand you to say that since '61 for every year during that time, you have made the Crossman House your headquarters for engaging parties in the summer time?
A. I have been to the other house sometimes.
Q. Can you tell or can you not tell what years you made the Crossman House your headquarters for getting jobs?
A. Yes, sir.
Q. What years did you make that house your headquarters for getting jobs?
A. I just now told you.
Q. Tell me again.

A. Since 1861.
Q. Every year?
A. '65 I mean to say; I made a mistake there.
Q. Every year since 1865 you have made the Crossman House your headquarters for getting jobs?
A. Yes, sir, for boating.
Q. I understood you to say on your direct examination that you had made that your headquarters for three years; now do you say that this was correct? Do you say that you made a mistake and that you really made that your headquarters every year since 1865?
A. Yes, I say that.
Q. Now, can you tell when you first saw Mr. Davey there?
A. No, I can't tell the day.
Q. Can you tell what year you first saw him there?
A. My best judgment would be five years, perhaps, before he died.
Q. What year would that be in?
Objected to by defendant's counsel.
A. I can't tell; I remember the years but not dates.
Q. You have seen Mr. Davey drink liquor, you say?
A. Yes, sir.
Q. But you don't know what kind of liquor he did drink?
A. No, sir; I couldn't tell.
Q. Was he a genial, pleasant, sociable man?
A. Yes, sir.
84 Q. Free and popular with the boatmen?
Same objection as to previous question.
A. What do you mean by that, friendly?
Q. Yes.
A. He seemed to be friendly; yes, sir.
Q. Did you ever know him to be here at the bay in company with any friends from Jersey City where he lived?
A. I couldn't say, sir.
Q. Never knew any of his companions?
A. I don't know where he lived at that time exactly; I don't remember; I did know probably, but I don't remember now.
Q. But you do not know of any gentleman who came here with him?
A. No, sir; I don't remember any.
Q. So far as you know, he was always here alone, that is, there was no person here with him from his place of residence?
A. Do you mean his family, his wife?
Q. His family or any friends or associates who came from the same place?
A. I have just said I saw his wife with him.
Q. That was just before he died?
A. Yes, sir.
Q. Was she ever here at any other time?
A. I don't know.

Q. Then you can't say you ever saw anybody else here with him as friend or companion?

A. I can't remember.

Q. Do you recollect ever seeing any gentleman with Mr. Davey at the Crossman House who had come with him from his home?

A. I couldn't tell where the gentleman was from; I saw a gentleman with him, where he lived I couldn't say.

Q. You don't know who they were?

A. No, sir.

Q. Did you ever hear their names?

A. I can't remember.

Q. Did you ever see them drink?

A. Yes, sir.

Q. With him?

A. Yes, sir.

Redirect examination:

Q. Since you have rowed parties have you resided in Alexandria Bay?

A. Yes, sir.

Q. Since 1864?

A. Lived here do you mean?

Q. Yes.

A. I have been away winters once in awhile, but mostly I have been here.

Q. Has Mr. Crossman kept a house here during that period?

A. Yes, sir.

Q. And when you were asked as to your headquarters for engaging parties did you confine yourself entirely to the Crossman House?

A. Not exactly; no, sir.

Q. In short, you engaged parties wherever you could find them?

A. Yes, but I went there the most.

Deposition of Theodore Lear, taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Alexandria Bay, New York.

THEODORE LEAR, a witness called on behalf of the defendant, being duly sworn, testified on direct examination as follows:

85 By Mr. STRONG:

Q. Where do you live?

A. I live in Canada just now; Rockport, Province of Ontario.

Q. How long had you known Mr. Davey?

A. I can't say exactly; I think I knew him ever since he came to the river.

Q. How many years before his death?

A. I couldn't say exactly; eight or ten perhaps.

Q. Are you proprietor of any house?

A. Yes, sir; the Island View House.

Q. How long have you been proprietor of that?

A. Ten or eleven years; eleven years, I think; I could tell by looking back at my register.

Q. Do you remember when Mr. Davey died?

A. I remember, but I can't swear exactly to the year.

Q. It was 1881; was he a frequent visitor at your place?

A. Yes, sir.

Q. For how long before his death—how many years?

A. I think about three years.

Q. Where was he then stopping?

A. First time I knew him—first time I saw him?

Q. During those three years?

A. He stopped at the Crossman House.

Q. How often while he was stopping here at the Crossman House, did he come to the Island View House?

A. Probably he was there every other day, sometimes every day.

Q. Who did he come with?

A. I don't remember him coming there only with White and Dereyaw.

Q. Those were his boatmen?

A. Yes, sir.

Q. What time did he come there usually?

A. Forenoon, between 10 and 11 o'clock.

Q. Stay how long?

A. Used to stay till one or two o'clock.

Q. Stay to dinner?

A. Yes, most every time.

Q. Did you keep a bar there?

A. Yes, I did at that time.

Q. Did you see him drink liquor at the bar?

A. Certainly; most everybody who comes takes a drink of liquor.

Q. How much of the time did you serve him yourself?

A. I served him very near altogether; of course I had a boy there a few times.

Q. What did he usually drink?

A. Generally took brandy at the bar.

Q. Sometimes any other liquor?

A. I don't think he ever did at the bar.

Q. How often did he drink at the bar?

A. I couldn't swear exactly; not how often.

Q. To your best recollection about how often?

A. I couldn't say; he would generally call up the boys—he was a great friend of the boys, you know—probably once an hour or some such thing; I wouldn't swear he took whisky or brandy every time though.

Q. When he went away did he take any liquor with him?

A. Yes, sir.

86 Q. How much?

A. He most generally took a bottle of brandy and sometimes he took a bottle of Tom gin.

Q. Took both together?

A. I couldn't swear to that.

Q. I mean one of each at a time?

A. One bottle; some days he would buy a bottle of brandy; he didn't drink much gin anyway, at least I never——

Q. Just answer the question; did he sometimes buy more than one bottle of liquor?

A. One bottle of each kind?

Q. Yes.

A. No, he never took but one bottle of each kind.

Q. Did he sometimes buy one bottle of gin and one bottle of brandy and take it away?

A. He did sometimes; he didn't buy much gin.

Q. Did you sell him the liquor yourself?

A. Yes, sir.

Q. Whenever you saw him at the Island View House, which you have stated was sometimes every day, and certainly every other day, state whether or not he appeared to you to be under the influence of liquor.

A. He was a man that let him stay in a boat and come along there; you know he was very stiff-legged when he got out.

Q. The point is this, whenever you saw him at the Island View House, which you have already stated was sometimes every day, and certainly every other day?

A. It would average as much as every other day I think.

Q. Did he or did he not appear to you to be under the influence of liquor?

A. Of course a man must be a little under the influence of liquor; of course he wouldn't be so, he couldn't get around or anything of that kind.

Q. You can easily say whether he did appear, or did not appear to be under the influence of liquor?

A. Not so he could not get around; he was straight and behaved himself and all that kind of business.

Q. Did you notice what effect the liquor had upon him which he took at your house, whether he appeared to feel that or not?

A. Well, of course, I couldn't swear right down by his appearance.

Q. Answer yes or no?

A. Ask me the question again.

Q. Did you notice what effect the liquor had upon him which he took at your house, whether he appeared to feel that or not?

A. I suppose he was under the influence of liquor a little because of course like anybody else that takes six or seven drinks he is going to get under the influence of liquor.

Q. You have seen him take six or seven drinks at your house?

A. He would take six or seven drinks probably while he was there?

Q. Was this practice of using liquors as you have stated the same in other years as in 1881?

A. The first time I ever knew Mr. Davey he stopped with a minister here.

Q. I didn't ask that; I mean for the last three years.

A. The last three years he was there I did not see so much difference as I know of.

Q. On the Sunday previous to his death was he at the Island View House?

A. Yes, sir.

87 Q. Did you serve him any drinks of liquor?

A. Yes, sir.

Q. Where?

A. In the sitting-room.

Q. How long was he there?

A. There to tea, and he came over in the afternoon.

Q. How long was he there?

A. I suppose two or three hours.

Q. How often did he drink?

A. I don't think he drank much that day; I don't remember serving him but once.

Q. Didn't he drink two or three times?

A. I don't remember it; you take a big crowd, so, and you can't remember; I wouldn't swear he drank two or three times that day.

Q. Did you sell him a bottle of Old Tom gin, which he took away with him?

A. Yes, sir.

Q. And he took it away with him?

A. Yes, sir.

Q. How much he had been drinking previous to the time he came to your place, and how much he drank after he left your place, you don't know?

A. No, sir.

Q. Is all that you know about his drinking what you saw at the Island View House?

A. Yes; of course I used to meet him here at the bay once in a while.

Q. Did you see what he drank here?

A. No, sir; I wouldn't swear only as to what I give him myself.

Q. Only at the Island View House?

A. Yes, sir.

Cross-examination by Mr. LINN:

Q. This Island View House is in Canada?

A. Yes, sir.

Q. You kept pretty good liquors there?

A. Calculated to keep the best when we keep any.

Q. And sold a little cheaper than could be bought on this side of the river?

A. I suppose so; of course I don't know much about American prices.

Redirect examination:

Q. I think you said that every time he came there he bought a bottle of liquor and took it away with him?

A. I think every time he came he bought a bottle.

Q. And took it away?

A. I think he did; I won't say every time, but I think he did; that is a pretty particular thing to swear to, every time; sometimes he took one bottle and sometimes he took a bottle of each.

Q. But the best of your recollection is, every time he was there he bought a bottle of liquor and took it away with him?

A. I think he did; yes, sir.

Q. It is about three miles from the Crossman House to your place?

A. Yes, sir.

Recross-examination:

Q. During the time that he was in the habit of visiting your house, do you know whether any friends or companions from Jersey City were with him?

A. I think Mrs. Davey was there once.

Q. His wife was there once?

A. I think so.

88 Q. Do you recollect of any of his gentlemen friends being there?

A. I used to know a good many of his Jersey friends, but I don't think there was any of them there to my place; of course it was a good while since I have known Mr. Davey; we were particular friends.

Deposition of Louis Dereyaw, taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Alexandria Bay, New York.

LOUIS DEREYAW, a witness called in behalf of the defendant, being duly sworn, testified on direct examination, as follows:

By Mr. STRONG:

Q. You attend here pursuant to subpœna?

A. Yes, sir.

Q. Where do you reside?

A. This is my home, Alexandria Bay.

Q. How long have you lived here?

A. I have made it my home here for the last five years, with the exception of the summer months; I was away one winter; I was West.

Q. You refused to talk with me about the case, did you not?

A. I refused to give any evidence until I was called upon the stand.

Q. Did you or not refuse to talk with me about the case until you were called upon the stand as a witness?

A. Yes, I did.

Q. So that I have no knowledge as to what your testimony is to be?

A. That I don't know; I don't think you have.

Q. Not from you?

A. No, sir, not from me.

Q. Have you talked with anybody about this case?
A. No, sir.
Q. Have you talked with Mr. Mattoon here about it?
A. Not about the case.
Q. Or Mrs. Davey?
A. No, sir.
Q. Or Mr. Linn?
A. No, sir.
Q. Or anybody else?
A. No more than it has been mentioned that the trial was coming off, that is all.
Q. Did you know William A. Davey in his lifetime?
A. Yes, I knew a man by that name.
Q. How long have you known Mrs. Davey?
A. I couldn't say the length of time; I remember Mrs. Davey being here one summer.
Q. Was he the husband of Mrs. Davey at that time?
A. Yes; that was what I supposed.
Q. Did you ever act as his boatman or guide on the river?
A. Yes, sir.
Q. What year?
A. I could not exactly tell you; I think it was the year before he died.
Q. Were you here when he died?
A. No, sir.
Q. Did you row him the year that he died?
A. No, sir.
Q. Was it the year preceding his death that you rowed him?
A. To the best of my knowledge it was.
Q. How often did you go out on the river with him?
A. Most every day while I was engaged to him.
89 Q. How long were you engaged to him?
A. Seventeen days.
Q. From what dates, if you can tell?
A. That I can't say.
Q. Where was he stopping at that time?
A. The Crossman House.
Q. Was there any one with him?
A. There was a gentleman with him.
Q. Did he go out in the boat with him?
A. Yes, sir.
Q. What was the gentleman's name?
A. I couldn't say.
Q. Where was he from?
A. I couldn't say.
Q. Did he go out in the boat with you every day?
A. He went two days that I know of.
Q. I ask you if he went every day?
A. I couldn't say; he did not go every day while he was here.
Q. Did he go more than two days that you know of?
A. I couldn't say that he did.

Q. The rest of the time did you and Mr. Davey go alone?
A. I think Mrs. Davey went one day.
Q. With the exception of that day and the two days you have spoken of, the rest of the time did you and Mr. Davey go alone?
A. Yes, sir.
Q. What time did you go out in the morning?
A. I wouldn't swear to the exact hour; sometimes in the forenoon.
Q. What time did you come in?
A. We would come in along in the afternoon, anywhere from three to six o'clock.
Q. Did you see him after you came in?
A. Sometimes I used to see him.
Q. When?
A. In the evening.
Q. Where?
A. Around the Crossman House.
Q. What part of the Crossman House?
A. He would be on the stoop there under the office.
Q. Did you see him in the bar-room?
A. I have seen him in the bar-room.
Q. How often?
A. I can't say.
Q. Didn't you see him there every evening?
A. I wouldn't swear to it.
Q. What is your best recollection about it?
A. I couldn't say.
Q. Haven't you any recollection about it?
A. I have a recollection of seeing him in there, but I can't say how many times.
Q. Have you seen him drinking at the bar there?
A. I think I have.
Q. How often?
A. I can't say how often.
Q. Every evening?
A. No, sir; I can't say every evening.
Q. Were you in the bar-room every evening?
A. No, sir.
A. Every evening that you were in the bar-room did you see him there?
A. No, sir.
Q. How often did you see him drink in the evening at the bar?
A. I can't say.
Q. Did you ever drink with him at the bar?
A. I think I did once at the Crossman House.
Q. When you went out in the boat did he take liquor with him?
A. Sometimes he had liquor in the boat.
90 Q. What did he take?
A. I couldn't say.
Q. Didn't you drink with him?
A. Well, I had brandy with him; not very often.
Q. What did he drink when you drank with him?

A. I don't know as I can swear to the liquor myself.
Q. What in your best opinion was it?
A. I wouldn't swear to the liquor.
Q. What in your best opinion and according to your best recollection was it; I don't want you to swear to it; I want your best recollection and best opinion?
A. I think it was brandy.
Q. Don't you know that every time you went out with him he had a bottle of brandy with him?
A. I don't know that he did.
Q. According to your best recollection, when you went out with him, didn't he take a bottle of brandy along with him?
A. No, sir.
Q. On the majority of occasions that you went with him, didn't he take a bottle of liquor with him?
A. I can't swear that he did.
Q. According to your best recollection?
A. Sometimes he had liquor with him and sometimes he did not.
Q. Don't you know that he was in such a condition from liquor, from the drinking of liquor, that you were obliged to bring the table, or spread the dinner up near him?
A. No, sir.
Q. Haven't you said that?
A. No, sir.
Q. Did he take wine with him ever?
A. No, sir, not that I know of.
Q. So that whenever he took anything it was brandy or liquor of some kind?
A. It was liquor, yes, sir.
Q. Did you see him drink liquor in the boat?
A. I have seen him drink from a bottle he had; yes, sir.
Q. How often did he drink?
A. That I can't tell.
Q. Your best recollection?
A. Well, three or four drinks through the whole day.
Q. Did you drink three or four drinks with him through the whole day?
A. No, sir.
Q. Was there any other boatman with him that year?
A. I don't know, sir; I know I was with him seventeen days.
Q. Was that during the whole time that he was here?
A. That I can't say.
Q. Did you ever row him over to Pine Island?
A. Yes, sir.
Q. How often did you go over there with him?
A. I remember being there once with him.
Q. Weren't you there more than once?
A. I could not swear that I was.
Q. Weren't you there as often as every other day?
A. No, sir.
Q. You know Mr. Lear?

A. Yes, sir.
Q. Is he a reliable man?
A. As far as I know about him.
Q. He stated that he was there every other day; as often as every other day?
A. Not that I remember of.
Q. Did you go up with him and drink at the Pine Island House?
A. I think I drank with him or the other gentleman that was with him. I don't know which it was.
91 Q. Did you ever go to Benson's house?
A. That is the one you have been referring to.
Q. Whose house did you understand me to be referring to in these questions?
A. Benson's.
Q. Now Mr. Lear's house; what is the name of his house?
A. Island View.
Q. Did you ever go over there?
A. Yes, sir.
Q. How often did you go there?
A. I don't know, but I have been there as much as two or three or four times a week, I could not swear positively as to the days.
Q. As often as every other day?
A. Well, I wouldn't swear to the day because I don't recollect the exact dates.
Q. Did you see what he bought there?
A. I have seen him buy something there.
Q. What did you see him buy?
A. Saw him buy a bottle.
Q. Bottle of what?
A. Liquor, I suppose.
Q. How often did you see that?
A. I couldn't say, sir.
Q. Didn't you see it every time he went there?
A. I couldn't swear to that.
Q. Would you say that he did not?
A. I couldn't swear that he bought liquor every time he was there.
Q. Can you swear that he did not buy liquor every time he went there?
A. Yes, I can on one occasion swear he did not.
Q. Is there any occasion but one you can swear he did not buy liquor there?
A. I would not be positive; I would not swear.
Q. Is there any other place you went with him besides Mr. Benson's house and Mr. Lear's?
A. I don't remember whether we went to any other house to dinner or not.
Q. Did you have dinner on the islands sometimes?
A. Sometimes, yes.
Q. What time was it in the morning that you went over to the Island View House; Mr. Lear's I am speaking of?

A. Sometimes in the forenoon; I can't give the hour.
Q. About what time?
A. About 11 or 12 o'clock, got over there just before dinner.
Q. Did you see him drink at the bar there?
A. I have seen him drink there; yes, sir.
Q. See him drink at the bar at Mr. Benson's?
A. The time that the gentleman and he were there, I think he did drink at the bar.
Q. Where did you stay while he was up at these different houses?
A. Sometimes I used to be in the hotels, and sometimes I was outside.
Q. You were not with him in the bar-room?
A. Not all the times; no, sir.
Q. Did you see him drink in the morning at the Crossman House?
A. No, sir; I can't say that I did.
Q. Were you around the bar-room?
A. I used to be sometimes.
Q. Did you see him in the bar-room?
A. I can't say that I did in the morning.
92 Q. Now, in 1881, did you see him at all?
A. Was that in the season that he died?
Q. Yes.
A. No, I think not; I couldn't swear that I saw him that season, because I was not here a part of the season.
Q. Was there any reason for going over to Mr. Lear's house that you know of, except to either drink at the bar or else buy some liquor?
A. He used to like to go over there for dinner he told me.
Q. How often did he go there for dinner?
A. Sometimes two and sometimes three days a week.
Q. Didn't you usually prepare the dinner on the islands?
A. Not so much for Mr. Davey.
Q. Didn't you usually prepare the dinner on the islands for Mr. Davey?
A. When he took dinner out.
Q. When he took dinner out where?
A. On the islands.
Q. Didn't he usually take dinner out on the islands?
A. Some days he would and some days would not.
Q. Didn't he usually take dinner out on the islands?
A. I have answered the question.
Q. Did he not usually take dinner out on the islands?
A. Some days he did; I am giving you the best of my knowledge.
Q. Was there any reason for his going over to Mr. Lear's house, or Mrs. Benson's house, when he did not take dinner there, except to buy liquor, that you know of?
A. I don't know of any reason for going.
Q. Was there any reason that you know of for his going to Mr.

Lear's or Mr. Benson's when he did not take dinner, except to buy liquor there?

A. I didn't know he went to buy liquor there.

Q. I didn't ask that; was there any reason that you know of for his going to Mr. Benson's or Mr. Lear's, when he did not take dinner there, except to buy liquor?

A. I didn't know his reasons for going there.

Q. Was there any reason that you know of for his going to Mr. Benson's or Mr. Lear's, when he did not take dinner there, except to buy liquor?

A. I didn't know that he went there to buy liquor; I didn't ask the man his business; he told me he wanted to go to such a place, and I took him there.

Q. Do you know of any other reason for his going there, except to buy liquor, when he did not take dinner there; do you know of anything to call him there when he did not take dinner there except to buy a bottle of liquor?

A. He did not tell me what his reasons were.

Q. Do you know of any other reason except to buy liquor?

A. I didn't know he went there to buy liquor.

Q. You did know that he went there to buy liquor?

A. I saw him buy liquor there, as I said before.

Q. Were not those the usual places where you got your liquor?

A. When we bought any liquor, yes.

Q. Did you ever take any liquor from the Crossman House?

A. No, sir; I can't say that I ever carried any from the Crossman House.

93 Q. So that the liquor you got, you got either at Lear's or at Benson's?

A. Yes, sir.

Q. Can you name any day when he went out with you on which he did not drink liquor?

A. I did not take notice enough——

Q. Can you name any day on which he went out in the boat with you on which he did not take liquor?

A. I could not swear; I am not positive.

Q. Isn't it your best recollection that whenever he went out with you in the boat he took liquor too, drank some liquor in the course of the day?

A. He used to drink some through the day, but I can't name any day.

Q. I want to know if you can name any day during the seventeen days that you were with him during which he did not take some liquor during the course of the day?

A. I could not swear to that, I am sure.

Q. Have you a recollection of any day when he took less than three or four drinks?

A. I couldn't swear to what he drank, because I didn't count his drinks or take notice of them.

Q. Have you a recollection of any day when he went out in the boat with you on which he did not take some liquor?

A. I did not always see his liquor, whether he fetched it in the boat or not.

Q. Have you a recollection of any day on which he went out in the boat with you during which he did not take some liquor?

A. I can't swear to any.

Cross-examination by Mr. LINN:

Q. Can you swear that he did take a drink of liquor every single day that he went out? Mr. Strong has asked you whether you could recollect any day when he did not drink some liquor or take with him; now I ask you in connection with that, if you can swear that he did drink every single day he went out?

A. I cannot swear.

Redirect examination:

Q. Isn't it your best recollection under oath—I don't ask you to swear to any day—but isn't it your best recollection that every day that he went out with you he drank some liquor?

A. I couldn't swear that——

Q. I don't ask you to swear; I want to know whether you being under oath, it is not your best recollection that every day he went out with you in the boat he drank some liquor?

A. There was often days that he drank that I didn't know what he was drinking, because I did not drink with him.

Q. Did he drink out of a bottle?

A. He took it out of the bottle and poured into a glass.

Q. Wasn't it in your best judgment from what you saw, liquor?

A. I can't swear whether it was or not?

Q. Did you ever know him to take anything else but liquor?

A. Yes; I have known him to take soft drinks?

Q. What soft drinks?

A. Ginger ale.

94 Q. When did you see that?

A. Some days when we were out; I couldn't say what days.

Q. I thought you said you could not tell what it was that he drank?

A. Some bottles that he took up I couldn't tell; but I could tell a ginger-ale bottle.

Q. Didn't you just say you could not tell what it was he drank?

A. I said some days I could not tell what it was he drank.

Q. Do you mean to say that you said some days you could not tell what he drank?

A. To the best of my judgment.

Q. Do you wish to say that you said "some days" you could not tell what he drank?

A. I think that was what I said.

Q. Didn't you swear in answer to my question that you could not tell what he drank?

A. Didn't I say "some days?"

Q. I didn't hear you say "some days."

Examination was here read to witness.

Q. You say there were often days that you did not know what he drank?

A. I said "some days," if I recollect right.

Q. You heard your testimony read over, didn't you?

A. Yes, sir.

Q. You didn't hear any "some days" did you?

A. That is what I said when I said it.

Q. Well, now, on other days besides the "some days" did he pour what he drank out of a liquor bottle?

A. Out of a liquor bottle?

Q. Yes; what appeared to you to be a liquor bottle?

A. I supposed it was a liquor bottle.

Q. Did he sometimes take more than one kind of drink with him?

A. That I couldn't say.

Q. Where did you get your ginger ale?

A. Crossman House.

Q. How often did you get ginger ale?

A. That I couldn't swear to; I can't recollect.

Q. Give us your best recollection; more than once?

A. Yes; I think so.

Q. More than twice?

A. I think we used to have some ginger ale along; of course, it is a long time ago.

Q. Isn't it your best recollection that when he drank he usually drank liquor?

A. When I knew that he was drinking liquor, I knew it.

Q. Isn't it your best recollection that when he drank he usually drank liquor?

A. As a usual thing; of course, sometimes I couldn't tell.

Q. I say, as a usual thing isn't it your best recollection that when he drank in the boat with you he generally drank liquor?

A. When I drank with him it was liquor he drank.

Q. I didn't ask when you drank with him; when he went in the boat with you, isn't it your best recollection that he usually drank liquor?

A. I would not like to swear just what he drank all the time.

95 Q. Isn't it your best recollection that when he went in the boat with you, he usually drank liquor?

A. I couldn't swear to that; not altogether.

Q. Didn't you say a minute ago that he did?

A. I know that he drank liquor.

Q. Didn't you say in an undertone a moment ago, "usually?"

A. I don't know that I did.

Q. Isn't it your best recollection that when he went in the boat with you he usually drank liquor?

A. I said before that he drank liquor.

Q. As a usual thing; will you please answer?

A. Yes; I will answer, but I want to understand the question just right.

Q. Isn't it your best recollection that when he went in the boat with you he usually drank liquor, on your oath?

A. Yes; I said that he drank liquor.

Q. As a usual thing, according to your best recollection under oath, did he not when he went in the boat with you, usually drink liquor?

A. Yes; he drank liquor.

Q. Usually?

A. What do you mean by usually?

Q. I will let you define it—didn't he usually drink liquor?

A. As I said before I couldn't swear to what he drank all the time.

Q. Didn't he usually drink liquor when he went in the boat with you, according to your best recollection; I wish the judge would caution the witness not to evade this question?

Judge WALTS: The only trouble is I have no power to make rulings here. If I had I would rule. The witness must answer the question; the question is a very plain one.

Mr. STRONG: You are trying to evade the question, Witness, and if you evade it any longer, I give you notice that I will apply to the proper place to have you punished for contempt of court. Now, according to your best recollection when he went in the boat with you, in the summer of 1880, did he not usually drink liquor?

A. If you call it usually drinking liquor, yes.

Recross-examination:

Q. What do you mean by "usually;" every day or every other day, or a majority of days?

A. I said before that I could not swear that he drank liquor every day, and that is why I answered so.

Q. Can you swear that he did usually drink liquor when he went with you in the boat?

A. Yes, sir.

Q. You say that he usually did drink liquor?

A. Yes, sir.

Q. What do you mean—every day or every other day, or every three days, or the majority of days?

A. I couldn't swear to every day.

Q. Could you swear to every other day?

A. I don't know as I could; I know he drank liquor, but I can't swear as to the amount nor days he drank.

96 Redirect examination:

Q. Did you ever help in or out of your boat?

A. I think I have took hold of his hand and helped him on account of——

Q. Never mind giving your reasons; helped him in and out at Mr. Lear's place or Mr. Benson's place?

A. I remember after his sitting in the boat a length of time that I would take hold of his hands on account of his legs——

Judge WATTS: He asks you the simple question, whether you helped him out of the boat?

A. Yes, sir.

Mr. STRONG:

Q. How often did you do that?
A. I couldn't say.
Q. Every day?
A. No, sir, I don't think I did.
Q. Was it a usual thing?
A. No, sir, I don't think it was a usual thing.
Q. It was not as usual as his drinking, was it?
A. I could not swear it was the usual thing.
Q. It was not as usual as his drinking?
A. I couldn't say I am sure.

Recross-examination:

Q. Why did you help him out of the boat?
A. He complained that sitting in a boat for a long length of time, the position he sat in, his legs were lame across here (pointing).

Redirect examination:

Q. I call your attention to the following question and answer: "Q. So that whenever he took anything, it was brandy or liquor of some kind? A. It was liquor, yes, sir." Is that true?
A. Yes, sir, excepting——
Q. Is that true or not?
A. Every time he took anything——
Q. You have heard that question and answer and I want you to answer, pay attention and answer, is that true?
A. Yes, sir.
Q. You did not say anything about ginger ale then, did you?
A. No, sir.
Q. Why didn't you say something about ginger ale then, if there was anything else that he took?
A. I think you asked me if he ever drank anything.
Q. No, you have heard the question and answer; you say that was true; why didn't you say something about ginger ale?
A. I don't know why I did not.
Q. Isn't it true as you stated there, that whenever he took anything to drink there, in that boat, that it was brandy or liquor of some kind as you testified?
A. I testified that he took brandy or liquor of some kind.
Q. And that testimony as you gave it was true, was it not?
A. It was to the best of my knowledge at that time.
Q. You had just as good knowledge then as you did at any time, didn't you, of the facts of this case?
A. I tried to have, yes, sir.

97 Recross-examination:

Q. When you testified that he sometimes took ginger ale with him, that was true wasn't it?

A. Yes, I calculated it to be true certainly, because I know that he took it.

Redirect examination:

Q. When your answer to the question was that when he took anything with him it was brandy or liquor of some kind, why did not you state ginger ale?

A. Probably I did not understand it, probably I did not understand that you wanted me to state soft drinks or not; of course I told you to the best of my knowledge.

Q. I have not asked you to go on; is it or is it not true that he had brandy or liquor of some kind with him whenever he took anything at all?

A. Well, I can't swear that he did.

Q. Is your testimony true?

A. It is as far as I know.

Q. Is it or is it not true that when he took anything with him he had brandy or liquor of some kind?

A. I think I said that—didn't I answer that?

Q. Answer it again; is it or is it not true that when he had anything with him at all it was brandy or liquor of some kind?

A. Yes, sir, I think it was only, I think——

Q. You have answered it, that will do, is the testimony as read over to you correct as you gave it?

A. Yes, as I understand it.

Adjourned to December 12, 1888, 9 a. m.

Deposition of Andrew C. Duclon taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Alexandria Bay, New York.

ANDREW C. DUCLON, a witness called in behalf of the defendant, being duly sworn, testified on direct examination, as follows:

By Mr. STRONG:

Q. You testified on the former trial of this action, did you not?

A. Yes, sir.

Q. You were not present when the case was recently called?

A. No, sir.

Q. Have you read over your testimony that you gave on the former trial?

A. Yes, sir.

Q. Does it refresh your recollection as to the facts as you then testified to them?

A. Somewhat.

Q. Was the testimony that you then gave true?

A. As near as I could tell it then.

Q. Is there anything in your testimony which you desire now to correct or modify or alter in any respect, and if so, state what it is, and if there is nothing, please say so?

98 A. I don't know; I can't quite tell; there are some things in it that I can't call to memory.

Q. You remembered them then did you not?

A. Yes, sir.

Q. And they were true then, were they not, according to your memory?

A. Yes, sir.

Q. Where do you reside?

A. Alexandria Bay.

Q. How long have you lived there?

A. Thirty-five years.

Q. What is your occupation?

A. I am master of a steam-yacht here now in the summer, in the winter I work at building.

Q. How long have you been master of a steamer?

A. I couldn't tell the exact date.

Q. Previous to 1881 were you a boatman and guide?

A. I think I was.

Q. For persons stopping at Alexandria Bay?

A. Yes, sir.

Q. How long have you been engaged in that occupation?

A. Well, from the time I was old enough to do it.

Q. Did you know William A. Davey?

A. Yes, sir.

Q. When did you become acquainted with him?

A. I couldn't tell you.

Q. Please look at the answer that you gave on page 11 of the record, if it will refresh your memory, and see if it will refresh your recollection?

A. I can't swear to the dates, not now.

Q. The best of your recollection, was it in 1870 or 1871?

A. '71—somewhere from 1870 to 1875.

Q. To the best of your recollection, was it 1870 or in 1871?

A. I think it was.

Q. Where was it that you became acquainted with him?

A. Alexandria Bay.

Q. What was he doing at Alexandria Bay?

A. He was here fishing.

Q. The first year that he was here did you act as his guide?

A. I don't think that I did.

Q. The next year did you?

A. I couldn't say.

Q. Look at the record page 11 and opposite the figures "30" down in the middle of the page and see what you said: "I was his guide the next year after that."

Q. Now how is the fact, were you his guide the second year that he was there, next year after the first?

A. I can't state whether it was the second or third.

Q. Was it either the second or third?

A. I couldn't tell you; I saw him here before I rowed him; then he came up and I rowed him afterwards, but I can't tell what year it was, whether it was first, second or third years.

Q. After you first saw him here did you see him here nearly every summer?

A. Nearly; yes, sir.

Q. Up to what time?

A. I can't tell that.

Q. Up to the time of his death?

A. Yes, sir.

Q. Did you see him the year of his death?

A. Yes, sir.

Q. How many years did you row him?

A. Three or four; somewheres along there.

99 Q. Do you know what years they were?

A. I do not; no, sir.

Q. How much was you with him the years when you rowed him?

A. With him every day.

Q. From what time in the morning to what time at night?

A. Usually about 6 or 7 till six in the afternoon.

Q. With him all day?

A. Yes, sir.

Q. Did you prepare his dinner for him?

A. Yes, sir.

Q. Were you in the same boat with him?

A. Yes, sir.

Q. What kind of a boat?

A. Ordinary row-boat.

Q. Did you observe about his habits as to the use of alcoholic liquors from the time that you first knew him?

A. Yes, sir.

Q. Did he use them?

A. Yes, sir.

Q. Did the use of them increase in the successive years or did it diminish?

A. I could not say.

Q. Please look at the question on page 11 of the record, the fourth one from the bottom, and see if your answer to it will refresh your recollection on the subject?

A. I think probably it increased a little.

Q. Who rowed him when you stopped?

A. I could not say.

Q. Look at the third question from the bottom of page 11 and see if that will refresh your recollection?

A. I don't know any man by this name that is here.

Q. What name?

A. I don't know what you would call it.

Q. Burgall?

A. Yes, sir.

Q. Do you know a man by the name of White?

A. Yes, sir.
Q. Did he row him?
A. Yes, sir.
Q. Did he row him the last one or two years, White?
A. He rowed him the last year he was here; I can't say before that.
Q. Where did he purchase the liquor that he used when you were with him?
A. At the Crossman House I suppose.
Q. Did you get any of it at Rockport?
A. Yes, sir.
Q. And took some from the Crossman House?
A. Yes, sir.
Q. Was that the usual thing to either get it at the Crossman House or at Rockport?
A. Yes, that is the only place I know he used to get it.
Q. Where is Rockport?
A. Across the river.
Q. How far over?
A. Four miles.
Q. Did you get for him at his request?
A. Yes, sir.
Q. At both places, Rockport and Crossman House?
A. I never bought any at the Crossman House for him that I know of.
Q. I thought you said you took it from the Crossman House?
A. We did, but I never bought any there.
Q. It was in his lunch basket?
A. It used to come down to the boat.
Q. It used to be brought down to the boat from the hotel?
A. Yes, sir.
Q. Did you usually bring it down from the hotel yourself?
A. Sometimes I would.
100 Q. Did you usually, I didn't ask "sometimes"?
A. Once in awhile I would; yes, sir.
Q. Look at the 5th question from the top on page 12 and see whether that refreshes your recollection about it?
A. Yes, I generally got it myself from this statement; I have forgotten now.
Q. How often did he drink during the day; you can refresh your recollection by looking at the question on page 12 of the record; you will find it the ninth question down?
A. Well, it is hard for me to state this.
Q. Does that refresh your recollection on the subject?
A. He used to drink every hour or so, perhaps not as often.
Q. Did he drink every season when you saw him there?
A. When I was with him.
Q. Did you see him in the evening at the hotel?
A. Yes, sir.
Q. Did he indulge in liquor in the evening?
A. Somewhat.

Q. How often?
A. That I could not say.
Q. Look at the question "To what extent?"
A. I couldn't tell you, he used to take a drink or so after supper occasionally.
Q. Two or three times during the evening?
A. Yes, I guess so.
Q. What did he drink in the way of liquor?
A. He used to drink brandy when he was in the boat.
Q. Was it in a bottle in the boat?
A. Yes, usually.
Q. Ordinary quart bottle?
A. Ordinary brandy bottle.
Q. It is what they call quarts of brandy isn't it?
A. I don't know what they do hold.
Q. I ask you if it was not what they ordinarily call "quarts?"
A. Well, I presume they call them quarts; they would lack a good deal of it probably.
Q. Do you know how much they lack?
A. No, I can't tell.
Q. Did you ever measure it?
A. No, sir.
Q. Did you ever measure to see whether there was a quart or not?
A. No, sir, I understand they don't hold a quart.
Q. Did he pour it out or drink it from a bottle?
A. Usually poured it out.
Q. In what?
A. A glass.
Q. Did he drink it raw?
A. Usually.
Q. Did he drink as much as one bottle in a day?
A. Yes, sir; I think he drank as much as one bottle in a day.
Q. What would he take with him during the day, how much, one, two or three bottles?
A. Sometimes one, sometimes not as much as one.
Q. Generally how was it? You can look at the fifth question from the bottom of the page to refresh your recollection.
A. Sometimes he would have a full bottle and sometimes he would not.
Q. Generally how was it?
A. I can't tell; sometimes it would be full and sometimes it would not; I don't know whether it was full more than it was, half full or not.

101 Q. I call your attention to this question and answer: "What would he take with him during the day? A. One bottle. Q. One bottle. A. One bottle generally." Is that true?
A. Yes, sir.
Q. And then at the hotel, at the bar, what he drank was that outside of what was in the bottle?

A. Yes, sir.

Q. How do you know that what he drank was brandy?

A. I used to take a drink with him myself once in awhile; and it was labeled "brandy" on it.

Q. Now, this practice of taking liquor and drinking it in the manner in which you have testified, and to the extent to which you have testified, did it continue as long as you knew him, in the evening and morning?

A. When I was with him; of course I didn't know what he did when I was not with him.

Q. As I understand it, you rowed him several years, did you not?

A. Yes; three or four or five years.

Q. Coming down to 1881, what was your business at that time? Look at the second question on page 13.

A. I was steamboating, running steam yacht.

Q. Did you have anything to do with Davey in 1881 besides when you casually met him in the evening?

A. Yes, sir.

Q. Was that when he was taken sick?

A. I think it was the same year.

Q. When was it he was taken sick, if you recollect it, what month, July or August?

A. I couldn't say.

Q. In the summer time, some time, wasn't it?

A. Yes, sir.

Q. How did you learn that he was sick?

A. I can't tell you now.

Q. Did Mr. Crossman tell you?

A. I think Mr. Crossman told me he was sick.

Q. Did you go up to his room?

A. Yes, sir.

Q. What time of the day was it?

A. It was some time in the morning, forenoon.

Q. About seven or eight o'clock?

A. Yes, I should judge somewhere along there.

Q. Was he in his room?

A. Yes, sir.

Q. Was he in bed?

A. Yes, sir.

Q. Did you stay with him?

A. Yes, sir.

Q. How long?

A. A day or two; I don't recollect now.

Q. Look at the fourth question.

A. A day and a half; next day some.

Q. Next day until one o'clock, isn't that so?

A. Yes, that is my recollection.

Q. What did you observe in the way of liquor in the room when you were there?

A. I don't think I saw any there.

Q. Did you see a bottle there?

A. Yes, sir.
Q. What kind of a bottle was it?
A. It says here a Holland-gin bottle.
Q. You say there it is a Holland-gin bottle, is that correct?
A. Yes, sir; I think it is.
Q. Was it empty?
A. I think it was; yes, sir.
102 Q. Where was it standing?
A. It was on a stand in the room somewheres?
Q. Where with reference to his bed; look at the third question from the bottom of page 13?
A. I think it stood near the head of the bed somewhere.
Q. On a stand?
A. Yes, sir.
Q. Did he have any acute attacks while you were attending him in the way of spasms?
A. Yes, sir.
Q. Describe what they were as nearly as you can, and to refresh your recollection you can look at the last question and answer on page 13 of the record?
A. He was out of his head some, and would raise up in bed; he talked some out of his head and raised up in bed two or three times.
Q. And what about his tongue?
A. He had bit it some.
Q. Did the doctor tell what to do about it while he was there in the room?
A. Yes, sir.
Q. What did he tell you?
A. He told me to make a little plug, and if he had any more attacks to put it in his teeth.
Q. Did he try to get up out of bed?
A. No he did not try to get out, he raised up in bed and sat up.
Q. Did you have to use force with him to keep him down?
A. No, sir.
Q. Didn't you have to put your hands on him?
A. Yes, sir.
Q. Did he ask for liquor at all when you were there?
A. I think he did.
Q. What did you do about it?
A. I think we gave him a little once.
Q. And did you try to dissuade him from taking it?
A. I think we did.
Q. What doctor was there while you were there?
A. Doctor Watson.
Q. Did you see anybody else in the room at all while you were there?
A. Yes, sir.
Q. Who?
A. I can't tell you.
Q. Did you see the clerk of the hotel there?
A. Yes, sir.

Q. What is his name?
A. I have forgotten now.
Q. Was it Frank Bruce?
A. I think that was his name.
Q. Did you see any other person there?
A. Yes, there were two or three different ones in the room.
Q. Did you see a colored boy up there?
A. Yes, I think he was in the room when he was taken sick.
Q. What was his name, Fred. Schuyler?
A. I can't tell; I don't know him.
Q. Is he the same one that testified on the last trial when you were there?
A. Yes, I think he was there.
Q. Did you notice whether Mr. Davey was under the influence of liquor at all before he was taken sick?
A. I think I did.
Q. When did you observe that?
A. I couldn't say when; it was the time when he was here that summer.
103 Q. Did you think he was drunk?
A. I couldn't say that he was; no.
Q. Look at the second question above the figures "36" on page 14?
A. I have no recollection of that.
Q. Did you so testify on the former trial? "Q. Do you think he was drunk? A. Yes, sir."
A. It says so here.
Q. If you did, was that true, is your testimony correct?
A. I don't recollect whether he was or not.
Q. Did you testify so on the former trial, and if you did was that correct?
A. If this statement is correct, I did so testify.
Q. If you did so testify, was that correct, was your statement correct?
A. It must have been.
Q. Was he not drunk most of the time?
Q. Look at the first question over the figures "36" on page 14?
A. In the first place, I wasn't with him most of the time.
Q. When you were, was he; it calls for the time when you saw him?
A. I did not see him all the time.
Q. Most of the time that you did see him, was he not drunk?
A. Yes; I don't know what you call drunk.
Q. I leave it to you; did you usually go with him alone rowing?
A. Yes, sir; I did usually.
Q. Did you ever go with him without a bottle of liquor?
A. I don't think we went without some along.
Q. Did you ever know him to abstain the whole day from taking it when you were with him?
A. I don't recollect, sir, now, whether he did or not.
Q. Look at the third question and answer?

A. He might have, but I couldn't say.

Q. The liquor that you gave him in the room when he was sick, where did you get it from?

A. From the bar, I think.

Q. Who told you to get it?

A. I don't think any one told me to get it.

Q. Did you send for it?

A. I think I went and got it myself; a little with ice.

Q. Look on page 17, the first question below the figures "42?"

A. It says here, "somebody brought it up."

Q. I ask you who told you to get it; did he or not, ask you to get it?

A. Yes, he wanted me to get it.

Q. How often did he ask for it?

A. I couldn't tell you.

Q. Was it quite often?

A. Yes, sir.

Q. Did you refuse to get it for him at times?

A. Yes, sir.

Q. What happened when you refused to get it; look at the 6th question from the bottom?

A. He wanted to go down after it himself.

Q. What effort did he make?

A. Tried to get up and get it.

Q. What did you do then?

A. I used to talk to him.

Q. Did you do anything else besides talk to him?

A. I don't recollect that I did.

Q. Look at the third question from the bottom?

A. Yes; I used to hold my hand on him to keep him from going.

Q. You did put your hand on him then?

104 A. Yes, to hold him down; he would try to get up and I would try to keep him down.

Q. And put your hand on him to keep him down?

A. Not violently.

Q. Didn't you have to take hold of him and force him back? Look at the second question from the bottom, page 17.

A. Yes; used to lay him down in bed when he raised up.

Q. What did he say when he made this effort to get up and you put your hands on him? Look at the last question on that page.

A. He told me he would go to the bar after it, it says here, but I have no recollection of it now, and I don't recollect what he said about it; it says here that he said he would go down to the bar after it.

Q. Is that correct?

A. I think so; yes, sir.

Q. When you refused to let him go, what then did he do or say?

A. After he would raise up he would be awake, and lay him down, and I don't recollect he would say anything, he would be sort of gone.

Q. How often did this occur?

A. Every hour or two.

Q. How many times did he request liquor before you went down for it at all?

A. I couldn't say exactly how many.

Q. A number of times?

A. Yes, I think so.

Q. What caused you to go and get it at last, when you did go?

A. I thought he needed it.

Q. Look at your answer on page 18, 5th question from top?

A. To keep him quiet.

Q. Did you stay with him all day?

A. Yes, sir.

Q. Did this state of things continue all day while you were there?

A. I think it did.

Q. During all that day was he in this condition of crying out for liquor and insisting on having it the first day you were there?

A. I think he was.

Q. You only got it for him once?

A. I think that is all.

Cross-examination by Mr. LINN:

Q. During the time when you have been giving your testimony now have you had placed in your hands a printed pamphlet purporting to give a copy of your testimony on the first trial had in this case?

A. Yes, sir; I believe so.

Q. And you have had this before you while you have been testifying?

A. Yes, sir.

Q. During the time that Mr. Davey came to Alexandria Bay, that you knew him, did he come alone or was he in company with friends from Jersey City?

A. In company with friends sometimes, not always.

Q. When friends accompanied him from Jersey City did they go out with him in the boat, or did they go in separate boats?

A. There was four or five used to go, two in a boat usually, sometimes he would have a friend with him, and when he came alone he would not have any one with him.

105 Q. When he came with friends, one of the company would go with him in the boat, and when he came alone he would go in the boat alone with you?

A. Yes, sir.

Q. These friends of his that came with him were in the habit of drinking also?

A. Yes, sir.

Q. What did you do during the day, engage in fishing?

A. A part of the day and stop on the islands for dinner.

Q. Do or do not people who go out here in boats during the summer time, fishing, drink more liquor than they do on ordinary occasions?

A. I couldn't say whether they drink more than they do elsewhere or not.

Q. How is it with you when you go out in a boat fishing, during the day, do you drink more liquor then, than you do when you are somewheres else?

A. Yes, I think a man can drink a little more out on the water than he can in the house.

Q. Do some people drink it because they think they must have it with the water here?

A. It would be a good thing in it once in a while when the water is warm.

Q. Do you know the names of any of these gentlemen who came with Mr. Davey?

A. Yes, sir.

Q. Who were they?

A. Mr. Van Horn and Mr. Clark.

Q. I think you stated that he appeared to be drunk every time you saw him; did you so state, did you mean to so state?

A. Well, he was intoxicated most every time I saw him, I thought.

Q. From the time when he first came here up to the time of his death?

A. No, sir.

Q. What time were you referring to then?

A. The last year he was here.

Q. You thought he was then under the influence of liquor when you saw him?

A. Yes, sir.

Q. Did you see him much during that time?

A. I couldn't tell you how much; I didn't see him day-times at all hardly; I saw him evenings.

Q. Then he was about the bar-room?

A. Yes, sir.

Q. He drinking there and others drinking?

A. Yes, sir.

Q. Did he play billiards any?

A. I think he did; yes, sir.

Q. And during this time that he was there drinking and you thought he was under the influence of liquor, playing billiards a part of the time?

A. Yes, sir.

Q. What kind of weather was it when he was taken sick?

A. I couldn't tell you.

Q. Recollect whether it was very warm?

A. I think it was quite warm in July and August; it was warm weather.

Q. Did you ever hear him say that his physician had prescribed for him intoxicating liquors, brandy or gin, or anything?

A. No, sir; not to my recollection; he might have said it; I didn't hear it; I don't recollect it now.

Q. How long was he taken sick before he died?

A. I think he was sick about a week; somewheres about that.

Q. Do you recollect how long he had been sick before his
106 wife came here?

A. I think it was about a day and a half after I heard he was sick before she came.

Q. You heard the first morning that he was sick, did you not?

A. I couldn't say positively, but I think so.

Q. After you went into the room with him, you remained there, during that day and a part of the night?

A. All night.

Q. Balance of the day and all night?

A. Yes, sir.

Q. He was a pretty sick man, then, was he?

A. Yes; I called him so.

Q. Part of the time delirious?

A. Yes; out of his head.

Q. Did he spit any blood?

A. Yes; from his tongue or somewheres; kept spitting blood.

Q. Did he complain of any pain anywhere in his head or chest?

A. Yes; I heard him complain of his head some.

Q. Do you know whether the doctor prescribed for him, Dr. Watson?

A. Prescribed medicine.

Q. Yes.

A. Yes; I gave him some.

Q. You gave him what the doctor prescribed?

A. Yes; I did.

Q. You said that there was a gin bottle in the room when you went there which you think was empty, did you see any gin bottle which was filled with gin while you were there?

A. I did not.

Q. Did you notice whether this one was really empty?

A. I think it was empty.

Q. Did you make any use of it for any purpose?

A. I don't think we did.

Q. When he asked for some liquor, did he ask for any particular kind?

A. I don't recollect that he did.

Q. After you gave him that it seemed to quiet him?

A. Yes, I think it did some.

Q. And that was the only time that you gave it to him?

A. I think it was only once that I gave it to him.

Q. Had the doctor been there before you came in, do you know?

A. Yes, I think he had.

Q. And did he come in again while you were there?

A. Yes, sir.

Q. How many times did he come in while you were there that day?

A. I couldn't tell you; I don't recollect.

Q. Did he come in the night time?

A. I don't think he did.

Q. At that time, before Mrs. Davey came, there were no friends here with him from Jersey City?

A. Not that I know of.

Redirect examination:

Q. The doctor did not prescribe any liquor for him, did he?

A. I don't recollect whether he did or not.

Q. When you rowed him, didn't you row him generally alone by himself?

A. I can't say that I did; I have rowed him with two in the boat, and I have rowed him alone.

Q. Most of the time that you rowed him—I call attention
107 to this question and answer on page 15: "Q. Was it one of the years that you rowed for him? A. Yes, I rowed him alone; that is, nobody else in the party."

A. Yes; I rowed him one year that there was no one else along; no other gentlemen here.

Q. Do you remember the last year you rowed him?

A. I couldn't tell now.

Q. Did you row him as late as '79?

A. Possibly along there somewhere; I can't tell you the dates at all; I have forgotten.

Q. I call your attention to this: "Q. What was the last year you rowed him? A. 1878 or 1879 I think." Is that your recollection now?

A. I can't tell as to the date now.

Q. What is your best recollection about it?

A. It was along there somewheres.

Q. You looked at a pamphlet during the progress of the examination here; see if that is the pamphlet you looked at (pamphlet shown to witness)?

A. Yes, sir.

Q. And the portion of it that you looked at was that portion which contained your testimony on the former trial, was it not?

A. Yes, sir.

Q. That is, from page 10 down to the end of page 18?

A. Yes, sir.

Q. And that is the same pamphlet that was referred to by Mr. Linn in his questions?

A. I think it is; I don't think you have changed them.

Recross-examination:

Q. What were his habits as to the use of cigars and tobacco?

A. He used to smoke quite a good deal.

Q. Do you recollect now who were in the room at the same time you were when he was sick?

A. I recollect that Watson was there.

Q. Any one else?

A. Yes; there were one or two others; I don't recollect who they were.

Q. Don't know their names?
A. No, sir.

108 Deposition of Charles W. Crossman, taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Watertown, New York.

CHARLES W. CROSSMAN, a witness on behalf of the defendant, being duly sworn, testified as follows:

Q. Are you one of the proprietors of the Crossman House of Alexandria Bay, N. Y.?
A. I am.
Q. Did you know William A. Davey?
A. Yes, sir.
Q. Was he a guest of the Crossman House in July and August, 1881, and if so, how long?
A. He was, from July 23 to the date of his death.
Q. What room did he occupy?
A. He first had room 102, and after his wife came No. 93 and 94.
Q. He died at the Crossman House, did he not?
A. He did.
Q. He was there previous years, was he not?
A. He was, for several years.
Q. In 1881 did you keep bar books?
A. I think we did.
Q. What has become of the bar books?
A. I don't know.
Q. Have you searched for the bar books in every place where they would be likely to be?
A. Yes, I have.
Q. Have you been able to find them?
A. No, I have not.
Q. Was Frank M. Bruer in your employ in July and August, 1881?
A. Yes, he was clerk in the office.
Q. Who had charge of the books of account in July and August, 1881?
A. Frank M. Bruer and Henry O'Brien.
Q. Have you any book containing William A. Davey's account with the Crossman House in July and August, 1881?
A. I have not.
Q. Have you looked for such book in all the places where it would be likely to be?
A. I have.
Q. Have you been able to find it?
A. No, sir.
Q. Do you know anything with respect to William A. Davey's habit as to the use of alcoholic liquors in July and August, 1881, or prior thereto?
A. No, sir.

Q. You did not come in contact with him to any extent, did you?
A. No, sir.

No cross-examination of this witness.

Deposition of Oliver J. Sykes, taken before Hon. C. H. Walts, county judge of Jefferson county, New York, at Watertown, New York.

OLIVER J. SYKES, a witness on behalf of the defendant, being duly sworn, testified as follows:

Q. Where do you reside at present?
A. At Alexandria Bay, N. Y.
Q. Are you at present employed there at the Crossman House?
A. I am.
Q. What position?
A. As barkeeper.
Q. How long have you been there as barkeeper?
A. Since 1876; twelve years.
109 Q. Continuously?
A. Yes, each season.
Q. You testified on the former trial of this action, did you?
A. Yes, sir.
Q. Did you know William A. Davey?
A. I did.
Q. When did you become acquainted with him?
A. I think it was soon after I went there.
Q. Did you serve him with liquor while there?
A. Yes, sir.
Q. Where?
A. At the bar.
Q. At what time of day?
A. In the morning and probably in the evening.
Q. How often, every day?
A. No, sir.
Q. Do you mean to say that he did not come in every day?
A. Yes, sir.
Q. Did you testify on the other trial that he happened in and called for it generally evenings?
A. Yes, sir.
Q. Was he in every evening?
A. No, sir.
Q. Did he drink at the bar in the evening?
A. Yes, sir.
Q. How many times in the course of an evening?
A. I cannot state.
Q. Did you testify on the former trial of this action in reply to the question how many times in the course of the evening as follows: "I should say about three or four times during the evening."
A. That is right.
Q. When he drank at the bar what liquor did he drink?

A. Sometimes gin and sometimes brandy.

Q. When he drank in the morning was it before or after breakfast?

A. Before breakfast.

Q. How many drinks did he take?

A. One, and sometimes when he met friends there would take another.

Q. Was liquor served from the bar in the rooms of the guests?

A. Yes, sir.

Q. Was a record of it kept in a bar book?

A. Yes, sir.

Q. What was the usual course of business in serving it in rooms?

A. The bell-boy always gave me the order and I gave it to him, and told him how much it was, and if it was not paid for he would tell me the number of the room and I would charge it to that number.

Q. During William A. Davey's stay at the Crossman House in July and August, 1881, did you see him when he appeared to be under the influence of liquor?

A. Yes, sir.

Q. When was it?

A. One evening was all I noticed.

Q. Did you not testify on the former trial of this action as follows: "Question. Whenever you saw him did you think he was under the influence of liquor? Answer. I have seen him both ways. Question. Did he often appear to be under the influence of liquor? Answer. Evenings, generally, he got around with the boys and drank sometimes—sometimes he would not take anything."

A. Yes, sir.

Q. Did this practice of drinking at Alexandria Bay continue as long as you knew him?

A. Yes, sir.

Q. Did you see him after he was taken sick?

A. No, sir.

110 Q. The evidence you gave on the former trial was true, was it not?

A. Yes, sir.

No cross-examination of this witness.

Deposition of Cyrus Dale, taken before D. F. Gott, Esq., United States commissioner, at Syracuse, New York.

CYRUS DALE, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. MATHEWSON:

Q. Where do you live?

A. 342 West Water street, Syracuse, N. Y.

Q. How long have you lived there?

A. About a year.

Q. Your name is Frederick Schuyler?
A. Some call me Frederick Schuyler, some Frederick Dale.
Q. Were you employed at the Crossman House, Alexandria Bay, in the summer of 1881?
A. I was.
Q. In what capacity?
A. As bell-boy.
Q. More than one season?
A. Only one.
Q. During summer months of 1881?
A. Yes, sir.
Q. Did you know William A. Davey?
A. Yes, sir.
Q. Where did you first meet him?
A. I believe at the boat, at the landing of the Crossman House at Alexandria Bay.
Q. Did you make his acquaintance at the Crossman House?
A. I made his acquaintance coming from the boat at that time.
Q. How soon after his arrival?
A. As soon as he got off the boat.
Q. You had taken his satchels?
A. I took a small hand satchel and umbrella from the boat to the Crossman House.
Q. Did you say anything about waiting on him; if so, what?
A. I asked him if he would like me to wait on him while he was at the house; he said he would.
Q. Did you do so?
A. I did.
Q. Did you go to his room while he was there?
A. I did.
Q. At what time in the day did you go to his room?
A. Morning and evening generally.
Q. Was this on a few or most of the days he was there that you went morning and evening?
A. Most every day, I believe.
Q. How many times on the same day would you go to his room in the morning, as a rule?
A. I might say once or twice. It is a long time, and I don't remember more definitely.
Q. Were these times before or after breakfast?
A. Sometimes before breakfast and sometimes after.
Q. What did you go there for in the morning?
A. I mostly used to take up fresh ice water and water for his wash-bowl.
Q. Anything else?
A. Nothing that I know of. I have taken drinks to his room.
Q. Who took drinks to his room, if any one?
A. When I was there anything he wished I got for him myself.
Q. Were you or were you not there all the time he was at the house?
A. Yes, sir; I was.

111 Q. Was there any one boy who answered his calls particularly?

A. Yes, sir.

Q. Who was he?

A. Fred. Schuyler—that is myself.

Q. Did you or did you not ever take drinks to him in the morning?

A. Yes, sir; I believe I did.

Q. How frequently did you take drinks to him in the morning?

A. I would not wish to say whether it was every morning or not now.

Q. Was it nearly every morning, or what is your best recollections?

A. When he first came there I do not remember of serving drinks to him every morning.

Q. During the first part of his stay you say you did not serve drinks to him every morning?

A. I do not remember of serving drinks to him in the morning at all when he first came there.

Q. How about the latter part of his stay there as to furnishing him drinks in the morning?

A. I have taken drinks to his room in the morning.

Q. How frequently during the latter part of his stay there?

A. Probably every day.

Q. In the morning?

A. Yes, sir.

Q. How many drinks each morning?

A. I would not like to say positively.

Q. What is your best recollection?

A. I would say once anyway and would not say any more; that is on an average.

Q. Could you say you did not take more than one drink to him in the morning sometimes?

A. I would not.

Q. What would be your best recollection?

A. I have taken him drinks in the morning but I could not say whether one, two or a dozen.

Q. Did you testify before in this case?

A. Yes, sir.

Q. That was some time ago?

A. Yes, sir.

Q. What kind of drinks did you take him in the morning?

A. Nothing only plain drink or cock-tail that I remember.

Q. What do you mean by plain drink?

A. Whisky or gin or whatever he called for.

Q. What kind was usually called for and carried up by you?

A. I could not say.

Q. To the best of your recollection?

A. I couldn't remember whether it was whisky cock-tail or gin cock-tail. It was one or the other.

Q. Do you or do you not mean that the plain drink was either whisky or gin usually?

A. If I am not mistaken it was usually cock-tail.

Question repeated.

A. I could not remember what the plain drinks were I carried him. Whether it was brandy, gin or whisky.

Q. Did you ever take drinks to his room in the evening?

A. Yes, sir.

Q. Do you know whether he sometimes came down to the bar mornings for drinks?

A. I do not.

112 Q. How often did you take drinks to his room evenings?

A. Sometimes once in an evening—sometimes not at all.

Q. What was usually the case?

A. I usually took drinks to his room in the evening.

Q. How many times of an evening did you take drinks to his room when you took any?

A. Well I wouldn't wish to say; I wouldn't say over once.

Q. I wish you to look at this printed book and see if it refreshes your recollection?

Printed transcript of record to the Supreme Court of the United States in the case of The Ætna Life Insurance Co. *v.* Ada Davey shown witness.

A. Yes, sir; there is some things in there I said I know is true.

Q. Now, how many times would you say you took drinks to him in the evening?

A. I wouldn't say as it's been a long time ago and I cannot remember—sometimes once of an evening and sometimes more.

Q. Did you ever take more than one drink to him on an evening?

A. I think I have.

Q. What kind of drinks did you take to him in the evening?

A. That I could not remember.

Q. According to your best recollection, were the drinks which you took him in the evening usually hard drinks, like whisky, gin or brandy—or soft drinks?

A. To the best of my recollection, I think it was hard drinks.

Q. Do you remember Mr. Davey being taken sick at the Crossman House?

A. Yes, sir.

Q. Did you take any drinks to his room the night before he was taken sick?

A. I cannot remember; I would not wish to say.

Q. Did you ever take any bottles to his room?

A. Yes, sir.

Q. When was that?

A. I took them the afternoon before he was taken sick at night.

Q. Was it the afternoon or evening before he was taken sick at night?

A. It was the afternoon before he was taken sick at night.

Q. What size were these bottles?
A. They were supposed to be quart bottles.
Q. What did they contain?
A. One was Tom gin, and one—I don't know what the other was.
Q. Was it a hard or soft drink?
A. I can't remember that; whether it was whisky or brandy I can't remember.
Q. When did you learn he was sick?
A. The next morning, between 7 and 8 o'clock a. m.
Q. Did you go to his room that morning?
A. Yes, sir.
Q. Where did you find him?
A. In bed.
Q. Sitting up or lying down?
A. Sitting up.
Q. Did you speak to him?
A. Yes, sir.
Q. Did he answer?
A. Yes, sir.
Q. How did you know he was sick. What was the appearance of Mr. Davey in the morning when you saw him?
113 A. He was sitting up in bed; there was some blood on his night-shirt. There was also some on the slop jar beside the bed.
Q. What was the appearance of the bed itself?
A. There was some blood on the bed clothes.
Q. Did the bed or clothing look smooth or mussed up?
A. Mussed up considerable.
Q. Did you see the bottles you brought up the day before?
A. Yes, sir.
Q. Were they full or empty?
A. There was nothing in them when I saw them.
Q. Was anyone with Mr. Davey the day before when you took them up?
A. No, sir.
Q. Do you remember whether Mr. Davey said anything about drink that morning when you found him in bed?
A. Yes, sir.
Q. What, if anything, did he ask for?
A. He wanted a cock-tail.
Q. Did you get it for him?
A. Yes, sir.
Q. Do you remember what kind of a cock-tail it was?
A. I do not remember.
Q. Did he drink that?
A. Yes, sir.
Q. How do you know?
A. I saw him. It was made very weak.
Q. Then what did you do?
A. I reported to the office and they sent for a doctor.

Q. Were you in the room after that prior to his death?
A. Yes, sir; I was in and out.
Q. Did you hear him ask for liquor after that before his death?
A. I do not remember.
Q. If you, in the former trial, testified you heard him ask for liquor after that, was your testimony true according to your best recollection at that time?
A. Yes, sir.

Transcript of record shown witness, page 24.

Q. Did you or did you not so testify on the former trial?
A. Yes, sir.
Q. Do you know whether they got it for him or not?
A. I do not.
Q. Did you get him any drink after this?
A. Once I believe.
Q. Was, or was he not, out of his head when you saw him on the morning when you first discovered him sick or after that?
A. That morning he was as rational as any person; after that he was out of his head. I don't mean all the time.
Q. What did he complain of that morning, if anything?
A. He claimed that he saw pitch or fire and smoke or something of that kind. I can't now remember just what he said. He was trying to show it around the room; he was pointing to it; of course no one could see it.
Q. Did he remain perfectly quiet in bed?
A. Yes, sir.
Q. Do you or do you not remember of his kicking the bed clothes?
A. No, sir; I do not.

Q. Did you testify in the former trial he was kicking the
114 bed clothes?

A. Yes, sir; I believe I do now remember he was kicking the bed clothes.
Q. Did he make any further complaint respecting himself or his legs or arms or other members of his body that morning?
A. I believe he said he had had a spasm during the night, I believe, but am not sure he said something about somebody sawing his legs off.
Q. Did you testify on the former trial that he did say somebody was trying to saw his legs or arms off or something of that kind?
A. I believe I did say so.
Q. Was that true?
A. Anything I have sworn to was to my knowledge true.
Q. Then that statement was true?
A. Yes, sir.
Q. Do you remember taking ice water to Mr. Davey's room the night he was taken sick?
A. Yes, sir; I took ice water to his room every night.
Q. About what time?
A. From eight to nine o'clock in the evening.

Q. On the night before he was taken sick was he up or in bed when you took the ice water?
A. I don't remember.
Q. Did you testify on your former trial he was in bed when you took the ice water up that night?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. Did you ever see Mr. Davey intoxicated while he was at the Crossman House?
A. Yes, sir.
Q. How much of the time was he intoxicated while there?
A. That I could not say.
Q. Did you on the former trial testify that he seemed to be intoxicated most of the time while he was up there?
A. Yes, sir.
Q. Is that true?
A. Yes, sir.
Q. Did you on the former trial testify that some nights you would take drinks up three or four times to Mr. Davey?
A. Yes, sir.
Q. Is that true?
A. Yes, sir.
Q. What was Mr. Davey's appearance which led you to believe he was intoxicated?
A. Nothing more than his talk and looks.
Q. Why did you take drinks to him?
A. I should have taken none to him unless he ordered them.
Q. Where did you get the drinks from you took up there?
A. From the bar.

Cross-examination by Mr. POUCHER:

Q. How old are you?
A. Thirty-four years, October 16, 1888.
Q. Are you married or single?
A. I am not married.
Q. Are you living with a family now?
A. Yes, sir.
Q. Do you support and provide for the family?
A. Yes, sir.
Q. Who compose that family?
A. Me, a little girl and her mother and grandmother. That is all.
115 Q. How long have you lived with this family?
A. Twelve or thirteen months.
Q. Have you any children of your own?
A. No, sir.
Q. What is the woman's name that you describe as mother, with whom you live?
A. Mary E. Joiner; I am not living with this woman. I make it my home there.

Q. How long have you lived in Syracuse?
A. I came here a year ago last spring.
Q. Have you lived in this family ever since?
A. No, sir.
Q. How long have you lived in this family?
A. I went there last spring to board.
Q. By what name have you been known in Syracuse?
A. Some call me Fred. Dale and some call me Cy. Dale, I answer to either.
Q. Where did you live before coming to Syracuse, and how long?
A. Auburn, N. Y. I can't say how long I lived there. I ran away from home about 15 years ago.
Q. What was your father's name?
A. George W. Dale.
Q. Where were you first known as Fred. Schuyler?
A. I took that name when I had been away from home about two years.
Q. How long did you continue to be called by that name?
A. Up to the present time.
Q. You made the change yourself from Dale to Schuyler?
A. No, sir.
Q. Then as I understand it you now answer to these names, Fred. Schuyler, Fred. Dale and Cyrus Dale. Is that so?
A. Yes, sir.
Q. How long have you answered to those three names?
A. Ever since I ran away from home, about 15 years.
Q. How many years were you employed at Alexandria Bay?
A. One season.
Q. Can you swear positively which season that was?
A. No, sir; I would not.
Q. At how many hotels did you work there, and what hotels?
A. At one, the Crossman House.
Q. What time in the season did you go there? State as near as you can?
A. I think it was May or June.
Q. And what time did you leave?
A. I was there a little over two months, I think.
Q. Do you read and write?
A. I read a very little print. I can't write or read writing.
Q. Did you ever know Mr. Davey before you saw him at that hotel?
A. I did not.
Q. Who was with him when he arrived?
A. No person that I know of.
Q. Did he come by boat or cars?
A. By boat. I don't know the name of the boat.
Q. You saw him when he got off the boat at the dock?
A. Yes, sir.
Q. Which way did the boat come from, up or down the river?
116 A. I think from down the river. I can't say whether up or down.

Q. What time did the boat arrive?

A. I think at 9 or 10 a. m., but would not say that for sure.

Q. You then did not know Mr. Davey's name when he landed at the dock?

A. No, sir.

Q. There are two ways for footmen from this boat landing where this steamboat landed to the Crossman House, are there not?

A. Yes, sir; one up a steep ascent to the back of the house, the other around the road to the front of the house.

Q. Which one of these ways did Mr. Davey take on that occasion?

A. He went with me up the path, and not around the road.

Q. Were there a good many passengers that stopped at Crossman's on the boat Davey came on?

A. Might have been four or five; may have been no one besides Mr. Davey.

Q. What is your best recollection?

A. I think there were more than Mr. Davey.

Q. How many bell-boys were there there when you were there?

A. Part of the time five, part of the time six.

Q. How many guests were there?

A. I should think from 150 to 200 people.

Q. Then each bell-boy would have from 30 to 40 people to wait on?

A. I don't know how many.

Q. What is your best recollection of the number you had to wait on?

A. Three or four families. I had two to wait on. I can't tell the number of persons.

Q. Give me the names of all the persons you recollect that you waited on during the time Mr. Davey was there up to the time of his sickness.

A. I don't remember any. I remember I waited on Mr. Hull. I remember no names except Mr. Hull of Ithaca.

Q. Do you remember the number of Mr. Davey's room, if so, what was it?

A. Yes, sir—100.

Q. Do you remember the name of the day of the week he, Mr. Davey, came?

A. I do not.

Q. Do you remember the day of the week Mrs. Davey, his wife, came?

A. I do not.

Q. Do you remember the day she came as to the time he was first taken sick?

A. I think she came the day after, but I will not say for sure now.

Q. When did you first learn Mr. Davey's name?

A. After he came from the boat to the hotel.

Q. Did you learn it the first day he got there?

A. Yes, sir, I showed him to his room.

Q. How many days had he been there before he was taken sick?

A. I cannot say, I have forgotten.

Q. Give me your best recollection.
A. Probably three weeks.
Q. Did he go fishing the first day he got there?
A. I don't think he did. I don't know he ever went fishing.
Q. Did you ever see him go out in a row-boat?
A. Yes, sir.
117 Q. With fishing tackle?
A. No, sir.
Q. Was he lame when he first came there?
A. I don't know.
Q. What do you designate as soft drinks?
A. Beer or porter or something of that kind, ale, cider, pop and soda, &c.
Q. What do you designate as hard drinks?
A. Whisky, beer, hard cider; nothing else that I know of.
Q. Whatever you took up there in the morning you got at the bar did you?
A. Yes, sir.
Q. And how was it in the evening?
A. Anything in regard to drinks I took him I got at the bar.
Q. Did I understand you to say in your direct examination that you had seen Mr. Davey intoxicated at that house before he was taken sick?
A. As I supposed intoxicated.
Q. It was, then, a mere supposition of yours?
A. Yes, sir.
Q. Did you ever see him drink a glass of liquor in your life?
A. Yes, sir; what would be called liquor.
Q. Upon how many different occasions have you actually seen him drink liquor?
A. Once or twice, perhaps more; that many to be sure.
Q. And where—at the bar or in his room?
A. I have seen him drink at the bar and in his room.
Q. Upon how many different occasions do you now remember of having taken drinks to his room in the morning?
A. Once or twice. I wouldn't say that was all; that is all I now remember.
Q. Upon how many different occasions do you now remember of having taken drinks to his room in the evening?
A. About the same amount—once or twice.
Q. Do you now remember any other occasions than those stated of once or twice in the morning and once or twice in the evening, of having taken liquor to his room during his stay at the Crossman House up to the time of his last sickness?
A. I do not.
Q. Do you know whether liquor was prescribed for him by his attending physician?
A. If not mistaken, I think it was.
Q. Did I understand you to say that the afternoon before he was taken sick you took two bottles to his room?
A. Yes, sir.

Q. About what time in the afternoon?

A. It was after dinner; probably about the middle of the afternoon.

Q. One of these was Tom gin and the other you don't know the contents of, do you?

A. No, sir.

Q. I understand you to state in your direct examination that you thought Mr. Davey was intoxicated while at the Crossman House, and that you judge so from his talk and appearance. State particularly what he said which led you to that belief, and when it was and who was present, and describe in detail that appearance, first giving the conversation?

A. There was nobody present particularly during the time but myself. I can't tell you what he said. I can give no particular time when he was intoxicated.

Q. Is that the best answer you can give to that question?

A. Yes, sir.

118 Q. Describe his appearance which led you to that belief?

A. I saw the man when he was very thick in talking; he never went about anything that was rough; he was always gentlemanly with me; I never heard him quarrel with any person else.

Q. Was he always dressed neat and clean?

A. Yes, sir.

Q. And you saw him frequently engaged in conversation during the day and evening with ladies and gentlemen about the hotel?

A. I don't know that I ever did with anybody.

Q. Did you know of his having calls from the Thousand Islands House?

A. I don't know whether he did or not.

Q. Can you tell what day of the week it was you found him sick in his room?

A. I cannot.

Q. Who, if any one, sent you to his room that morning?

A. The clerk, Frank Bruce.

Q. About what time in the morning?

A. As near as I can recollect about 7 or 8 o'clock.

Q. Was his door unlocked?

A. Yes, sir.

Q. Be very particular and tell me who spoke first and what he said after you entered the room?

A. I spoke first and said: "Good morning, Mr. Davey."

Q. What was the next thing said and who said it?

A. Mr. Davey said "Good morning."

Q. What was next said and who said it?

A. Mr. Davey said he had had one of his spasms during the night; he poked out his tongue and showed where he had bitten it during the night.

Q. What was next said and by whom?

A. I believe that was all that was said then.

Q. Did you then go away?

A. I went to the office and reported that Mr. Davey was sick.

Q. How long did you remain in his room that time?
A. I couldn't tell you that; my best recollection is 5 or 10 minutes.
Q. When did you next go to his room?
A. I believe when the doctor came; I showed the doctor his room and left.
Q. About what time was that?
A. To the best of my knowledge about 10 o'clock a. m.
Q. When did you next go there before Mr. Davey's arrival?
A. I couldn't tell you that.
Q. Do you remember going to his room at all after that before Mrs. Davey's arrival?
A. Yes, sir.
Q. When, to your best recollection, did she get there?
A. If not mistaken, the second day after he was taken sick.
Q. Will you swear she did not get there the next day?
A. No, sir.
Q. Did they occupy the same room after she got there?
A. No, sir.
Q. What was the number of the room they occupied after she got there?
A. I can't tell you.
Q. Did you visit the room they occupied after she got there?
A. Yes, sir.
Q. How often?
A. Probably two or three times; I would not say how often.
119 Q. Can you give me any other conversation had with Mr. Davey at his room other than what you have detailed to me on this cross-examination?
A. No, sir; I cannot.
Q. Did you do any work in Mr. Davey's room the first morning of his sickness, and if so what?
A. I know of nothing except to move the slop jar over to the side of the washstand from the side of the bed. I don't know as I did this, but I think I did.
Q. You have given me on this cross-examination all that occurred in that room the first morning of Mr. Davey's sickness, have you?
A. I have given you all that I know that occurred.
Q. Which one of these three names which you have given us do you regard as your true name?
A. Cyrus Dale.
Q. And which do you wish to have inserted in this examination?
A. Cyrus Dale.
Q. And are you the same person who was examined in this case in behalf of the defendant at the trial thereof in Trenton, New Jersey, by the name of Frederick Schuyler?
A. Yes, sir.
Q. And did you swear on that trial that your name was Fred. Schuyler or Frederick Schuyler?
A. I did not.
Q. Did you give your name on that trial as Fred. Schuyler?

A. Yes, sir.

Q. Would you remember testimony you gave on that trial which purports to be contained in the printed book shown you on your direct examination, and which you examined independent of and aside from that printed matter?

A. No, sir. I don't think that I would, some parts of it.

Q. You do not remember the parts shown you and which you were interrogated as to until you had seen it in the printed book did you?

A. I did not.

Q. And independent of that book, independent of your examination of it you do not remember what you then testified to. Do you?

A. No, sir; there is some parts that I do not remember.

Q. And those parts are the parts which counsel called your attention to and exhibited the book on the direct examination?

A. Yes, sir.

Q. And you cannot testify whether the book is correct or not?

A. Yes, sir.

Q. You did not read all that purports to be your testimony in that book?

A. I did not.

Q. When were you subpœnaed?

A. Yesterday.

Q. By whom?

A. I don't know.

Q. Whom have you talked with about this case since you were subpœnaed?

A. Mr. Mathewson and the man who subpœnaed me.

Q. When you attended at Trenton as a witness, how much were you paid or promised?

A. I was promised $60 and my expenses.

Q. Did you get it?

A. The first time I went I did.

Q. Did you go a second time?

A. Yes, sir.

120 Q. When the case was tried?

A. The case was not then tried.

Q. How much did you get the second time?

A. He gave me $60 and all expenses except my fare back. He said it would be the same as the first time.

Q. How long did I talk with you about the case this morning?

A. About five minutes.

Q. Did I tell you that I wanted you to swear simply to the truth?

A. Yes, sir.

Q. At the first trial you went to Trenton from Rochester?

A. Yes, sir.

Q. Were you gone more than one day?

A. I left Rochester 4 o'clock p. m., Sunday and I returned the the next Sunday. I——

Q. Several of those days were taken in waiting for the trial of this case?

A. No, sir; I was sworn Tuesday, I think.

Q. Was any suggestion made to you on that trial or since that you testify to anything that was not so?

A. No, sir.

Q. You stated the season you were at Crossman House was the season Mr. Davey was ill there?

A. Yes, sir.

Q. Would you class rum, brandy and gin as soft or hard drinks?

A. Hard drinks.

Q. You have seen men intoxicated frequently?

A. Yes, sir.

Q. When you say you supposed Mr. Davey was intoxicated it was based on what you saw of his looks and appearance?

A. Yes, sir.

Q. Was there any doubt in your mind that he was intoxicated when you have stated that he was?

A. I think he was intoxicated.

Q. When you say that you can remember only one or two particular occasions when you took drinks to his room in the morning or evening do you wish to say that you did not take them on other occasions?

A. I have taken them to his room morning and evening, as I testified on direct examination, but I would not like to testify as to Monday or Tuesday, or any particular day.

Q. Did you ever see his physician hand him any prescription?

A. No, sir.

Q. What you testified to as to prescriptions was what you heard he prescribed?

A. Yes, sir.

Q. Do you or do you not now say that all your testimony at the first trial and in this examination has been to the best of your knowledge the truth?

A. Yes, sir.

Recross-examination:

Q. You swear you think Mr. Davey was intoxicated. Do you swear positively that he was?

A. I will not.

Q. Were you ever convicted of any offense by the name of Schuyler?

A. Once, for fighting.

Q. Were you ever convicted of any offense by the name of Dale?

A. Yes, sir; for the same charge.

121 Q. How often?

A. I was never arrested but twice, being these two occasions.

Q. What is your present employment?

A. I work in coal yard for Hopkins & Abbott.

122 Mr. Strong further informed the court that since the last trial the depositions of William White, William H. Hunt, John R. Gibson, Albert Root, James A. Root, and Joseph Senecal had been taken before a commissioner agreed upon at Watertown, N. Y., and proceeded to read the testimony so taken.

Deposition of William White, taken pursuant to stipulation before Honorable C. H. Walts at Watertown, N. Y.

WILLIAM WHITE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. STRONG:

Q. Mr. White, where do you reside?
A. Landsdown station.
Q. What is your business in the summer time?
A. Generally oarsman.
Q. And it was in 1881?
A. Yes, sir.
Q. Rowing for whom?
A. For any one who came along.
Q. For visitors?
A. Yes, sir.
Q. Where?
A. At Alexandria Bay.
Q. Where did you make your headquarters?
A. At the Crossman House.
Q. At Alexandria Bay?
A. Yes, sir.
122½ Q. Did you know Mr. William A. Davy?
A. I did, sir.
Q. How long have you known him?
A. For quite a number of years.
Q. Give us about the number of years.
A. 14 or 15 years, anyway.
Q. Did you ever row him?
A. I did.
Q. How many years did you row him?
A. 10 or 12 years altogether.
Q. Did you row him in 1881?
A. I did.
Q. And in 1880?
A. I think I did.
Q. How many days were you with him in 1881?
A. I was with him ten days.
Q. Up to what day of the week?
A. On Wednesday evening I left with another party.
Q. You were with him up to Wednesday?
A. Up to Wednesday night.
Q. Was he sick or well then?
A. He was sick on Wednesday.

Q. What day did he die?
A. Died on Saturday.
Q. Of the same week?
A. Yes, sir; of the same week.
Q. Do you remember when he came to Alexandria Bay? Do you remember his coming there?
123 A. Yes, sir; I do.
Q. And how did he come?
A. Came on the steamboat.
Q. Did he come alone or some one with him?
A. He was alone.
Q. Did you see him get off the steamboat?
A. Yes, sir.
Q. Do you remember who took his parcels or boxes?
A. The bell-boy was down there.
Q. What was his name?
A. I think it was Schuyler.
Q. Colored man?
A. Yes, sir.
Q. Did he go up to the house?
A. Yes, sir.
Q. Did you see him go up along with him?
A. Yes, sir.
Q. Saw Schuyler and Mr. Davy going up together?
A. Yes, sir.
Q. Where were you?
A. I was walking right along behind him.
Q. Was anybody with him?
A. Nobody.
Q. Except Schuyler?
A. No, sir.
Q. Was Mr. Mattoon with him?
A. I didn't see him at all.
Q. When you got up to the house did you see Mr. Davy?
A. I did.
124 Q. Did you speak to him?
A. I was talking to him.
Q. Where was he standing?
A. He was at the office.
Q. After speaking to him a little what did you do?
A. We went into the bar-room and had a drink.
Q. What time of day was it he came on the boat?
A. Just after dark—about 7 o'clock.
Q. You didn't go out with him on the river that day?
A. No; it was after dark.
Q. Did you go out with him next morning?
A. I did.
Q. About what time?
A. About 8 or 9 o'clock.
Q. How long did you stay out with him?
A. Stayed out till about six.

Q. Taking the general course of the day while he was there from morning until night, when did you usually see him first in the morning?

A. It would be about 8 o'clock, around the hotel.

Q. Was that before or after breakfast?

A. Before breakfast; he generally came down before that?

Q. What did you see him do before breakfast?

A. He used to go in and get a drink.

Q. Then what did he do?

A. Then he went and got his breakfast.

Q. And after breakfast did you see him again before you went out?

A. Yes, sir.

125 Q. What did he do after breakfast?

A. Sometimes he would go into the bar-room and take a drink.

Q. Then what time did you go out?

A. Then we would go out about 8 or 9 o'clock, as a general rule.

Q. And what direction did you go in generally?

A. Sometimes we went over on the Canada shore, Rockport, or Senecal's.

Q. Those generally the directions?

A. Sometimes we didn't go down there.

Q. Generally?

A. Yes, sir.

Q. How long did it take to go over to Rockport?

A. About an hour to go over there.

Q. How long did it take to go down to Senecal's?

A. About two hours.

Q. In going to Rockport or Senecal's how much time did you generally consume?

A. From two to three hours.

Q. Now, when over to Rockport and on the way down to Senecal's, did you see Mr. Davy drink any liquor?

A. I did.

Q. How often did he drink going over?

A. Sometimes three or four times; sometimes oftener.

Q. What did he generally drink?

A. Generally drank brandy.

Q. And in what did he generally pour it?

A. In a tumbler.

Q. What kind of a tumbler?

126 A. One of these common tumblers.

Q. And how much did he put in it?

A. He always took a good big drink.

Q. About how full was it?

A. About one-third.

Q. Did he take liquor from the Crossman House with him?

A. He generally had a flask.

Q. What sized flask?

A. I suppose about a pint.

Q. Did you have other liquor in the boat generally?

A. Most always had some.
Q. Where did you keep it?
A. Always in the stern of the boat.
Q. How much did you have?
A. Sometimes two bottles; sometimes one.
Q. Of what?
A. That was always brandy; sometimes, though, it was gin.
Q. Did he help himself?
A. Always helped himself.
Q. It was where he could get at it readily?
A. It was always where he could get at it.
Q. What place did you visit at Rockport?
A. Lear's Hotel.
Q. Kept by whom?
A. Theodore Lear.
Q. During these days that you were with him, from the time of his arrival at Alexandria Bay in 1881 until the time that he was taken sick, was anybody in the boat with you besides Mr. Davy at all?
127 A. No, sir.
Q. He was alone with you?
A. Yes, sir.
Q. Was anybody with you at Lear's and Senecal's besides Mr. Davy?
A. No, sir.
Q. Did he have any companion or companions upon his visit there and his excursions on the water?
A. Not last year he did not.
Q. I am speaking now all about 1881; when you got to Rockport and to Senecal's as well what was the first thing that Mr. Davy did?
A. He most generally went into the bar-room and took a drink.
Q. What was his condition on his arrival at Rockport and Senecal's generally?
A. He was generally under the influence of whisky; more so than he ever was before.
Q. Do you mean whisky?
A. Yes—or brandy; it don't make any difference.
Q. He drank brandy, did he not?
A. Yes, sir.
Q. Then after he had taken a drink what did he generally do?
A. Well, if we got there some time before dinner long enough, he generally had a sleep; if not, he did after dinner.
Q. Did this practice of going to sleep have anything to do with his condition as to being under the influence of liquor?
128 A. I think it did; yes, sir.
Q. How long did he stay?
A. Well, sometimes until 3 or 4 o'clock.
Q. How long did he sleep?
A. Sometimes a couple of hours; maybe a little less; I can't tell exactly.
Q. On waking up what was the first thing he did?

A. Most generally took a drink.
Q. Then how soon did you leave?
A. Generally went right away then.
Q. What time did you arrive at the hotel?
A. Generally about six o'clock I calculate; might get back little sooner sometimes.
Q. In the course of the afternoon from the time you left these places, Rockport or Grenadier's Island, did he drink any?
A. Yes, sir; always took some brandy before he got home.
Q. How much did he drink?
A. Three or four times.
Q. Did it depend at all on the length of time that you stayed out?
A. We didn't generally fish any after dinner; we rowed right along and came home a good deal quicker.
Q. Then after he reached home?
A. He used to drink some then.
Q. Did you see him after dinner?
A. Yes.
Q. Where was he?
129 A. He would be around the hotel.
Q. What part of it?
A. Down in the bar-room.
Q. Did you see him drink any in the course of the evening?
A. Yes, sir; I did.
Q. How many times?
A. I can't tell you exactly, but 2 or 3 times in the course of the evening; maybe more than that.
Q. Did you buy any liquor at Rockport or Senecal's?
A. Yes, sir.
Q. How much would you buy?
A. Sometimes two or three bottles at a time and sometimes one.
Q. What was it generally?
A. Generally brandy.
Q. Now, can you give us the quantity of liquor that he drank during the day while out in the boat, or what would be the average amount?
A. Through the whole day?
Q. Yes; while you were out?
A. He would drink a quart of brandy some days.
Q. Was that generally the case?
A. Most of the time.
Q. Is that exclusive of what he drank before he came out and what he drank after he returned?
A. Yes, sir.
Q. Now, in former years before 1881, did he visit Alexandria Bay?
A. Yes, sir.
130 Q. And spent about how much time there?
A. From 2 to 3 weeks on an average.
Q. And as to drinking during those years?

A. Well, he drinked all the time, but he never drinked so much as he did the last year he was there, on an average.

Q. About how many times in those other years, on an average, did he drink during the day?

A. I should think he drank a dozen times probably.

Q. You were with him how long in 1881?

A. Ten days. That is what he paid me for; ten days. I was with him ten days.

Q. At any time during 1881 did you speak to him about his drinking?

A. I did once.

Q. What did you say to him?

A. I spoke to him and said I didn't want him to drink quite so much.

Q. Did you tell him what the effect of it on him would be?

A. I told him if he didn't stop it would kill him.

Q. What did he say?

A. It was none of my business.

Q. Did you ever speak to him again about it?

A. No, sir; I never did.

Q. What was his condition as to nervousness and trembling during 1881?

A. He was very nervous.

Q. And trembling; how was that?

A. His hand was very trembling.

131 Q. And when he took anything in his hand—describe.

A. His hand shook very much.

Q. And in raising the glass of liquor to his lips?

A. His hand trembled.

Q. Did it tremble much or little?

A. Quite a bit.

Q. Quite a bit doesn't quite describe it so it amounts to much; describe how it was. Did you think it trembled a great deal or a little, which?

A. Quite a lot.

Q. Describe what his appearance was in 1881, so far as to the effect of liquor upon him, if you noticed it; describe what his appearance was.

A. He was bloated up very much in the face.

Q. And whenever you saw him, state whether he appeared to be under the influence of liquor.

A. He was under the influence of whisky most of the time he was there.

Q. Do you mean whisky or brandy; he drank brandy, didn't he?

A. Well, brandy.

Q. If he drank brandy say so, if whisky say so.

A. We call it all whisky.

Q. When you use whisky you use it as including all kinds of liquor?

A. Yes, sir.

Q. Did you see him in the course of 1881 when he was drunk?

A. I did, sir.
Q. How often?
132 A. Quite a number of times.
Q. Did you render him any assistance?
A. Yes, sir.
Q. Where did you so see him?
A. I saw him at the bay.
Q. Where?
A. At the Crossman House.
Q. Anywhere else?
A. Yes, I saw him there and other places.
Q. Where else?
A. Rockport.
Q. Where else?
A. Down at Senecal's.
Q. Tell us about that; when was it?
A. In 1881.
Q. Where down at Senecal's?
A. In the house.
Q. What time did you get there?
A. About noon.
Q. How long did you stay there?
A. Stayed there about three hours; sometimes less than that; maybe longer than that.
Q. I am referring now to the time when you saw him drunk down at Senecal's?
A. We stayed there most all the afternoon.
Q. What was his condition?
A. Well, he was under the influence of whisky or brandy.
Q. Did you help him at all?
133 A. When he came to get into the boat I did.
Q. He required help, did he?
A. Yes, sir.
Q. Describe how he acted.
A. He couldn't walk; I took him by the arm and helped him down to the boat and got him into it and we went home.
Q. Was there another time down at Senecal's?
A. Yes; I think there was once or twice down there.
Q. Was there one occasion when you stayed there very late?
A. Stayed there quite late one night.
Q. About what time should you think it was?
A. 10 or 11 o'clock, I think.
Q. Wasn't it later than that?
A. It might have been later.
Q. Had you gone to bed?
A. Yes, sir.
Q. Tell us what time you got there.
A. We got there at noon.
Q. Describe so the reporter can get it just what took place.
A. Well, we went there and stayed there that afternoon, and calculated to stay all night, and after we went to bed ——

Q. Did you say anything to Davy about staying all night?

A. No; I didn't say anything about it, but we calculated to stay all night. After we went to bed he got up and waked us up and wanted us to go to the bay with him that night.

Q. You have not told all that took place, have you? You got there at what time?

A. About 12 o'clock.

134 Q. What did he do when you got there?

A. Went up to the house.

Q. Then what did he do?

A. Drank some brandy and laid down and had a sleep.

Q. Then when he woke up what did he do?

A. He sat around there till dark.

Q. Did he drink more?

A. He drank more after that.

Q. Did he have a room there?

A. Yes, sir.

Q. Did he go to bed there?

A. Yes, sir.

Q. What time did he go to bed?

A. I should think about 8 or 9 o'clock.

Q. What was his condition?

A. He was the worse for liquor.

Q. Did you go to bed?

A. Yes, sir.

Q. About what time?

A. I should think about ten o'clock when I went to bed.

Q. Had you gone to sleep?

A. Yes, sir.

Q. Then were you waked up?

A. Yes, sir.

Q. By whom?

A. Mr. Davy yelled to me. I was sleeping in a room right across from him.

Q. Dark night, was it?

135 A. Pretty dark.

Q. When he called you did you get up?

A. Yes, sir.

Q. Where did you go?

A. I went down-stairs.

Q. Did you go into his room?

A. Yes, I went in there first before I went down-stairs.

Q. What was his condition then?

A. He was the worse for whisky.

Q. Worse for whisky?

A. Or brandy.

Q. Describe his condition as to nervousness and excitability, if there was any such thing.

A. He was a little wild. He said he wanted me to go to the bay with him; he expected some mail there and he wanted to get it.

Mr. Senecal didn't want him to go, and I didn't want him to go, but he was bound to go, so I had to go with him.

Q. You started up, did you?
A. Yes, sir.
Q. How far was it?
A. Six miles.
Q. Up the river?
A. Yes, sir.
Q. What time did you start?
A. It must have been nearly midnight, I think.
Q. How long did it take to row up the river?
A. About an hour and a half, I think.

136 Q. Did he drink any on the way up?
A. No, sir; he didn't drink any that night coming up.

Q. When you got up to the bay what did you do?
A. Went into the Crossman House.
Q. Was anybody up there?
A. Yes; they kept the house open all night.
Q. Now tell us just exactly what he did.
A. He went to the office and got his mail.
Q. How about hands—how were they when he opened it?
A. They were very nervous; he couldn't hold them in his hands steady enough to read them.
Q. Then what did he do with those letters?
A. He tore one of them up.
Q. What did he do with the other?
A. I think he put it in his pocket.
Q. Then what did you do?
A. He went up to bed then.
Q. Where did you go?
A. I went over to the camp we had on Well's Island.
Q. You say you have seen him drunk over at Rockport?
A. Yes, sir.
Q. What time of day?
A. About noon.
Q. Did he want assistance or not?
A. Yes, sir; he did.
Q. What did he do on arriving there in that condition?
A. Stayed in bed there.
Q. On arriving there in that condition and on getting up to Lear's house?

137 A. He used to go over and lay down and go to sleep; he had another house over from there, and he used to go over there and sleep and come back when he got done.

Q. How many times did that happen at Rockport?
A. Two or three times.
Q. Then at the Crossman House; did you see him intoxicated there?
A. Yes, sir.
Q. How many times?

A. Pretty hard to say how many times; two or three times, and maybe more than that.

Q. So that he required assistance or not?

A. Yes, sir; he did.

Q. What was your practice as to keeping Mr. Davy under your eye?

A. I was a little afraid that something would happen.

Q. What was your practice in regard to that; did you or not make it a practice?

A. Always made it a point to watch him the last year he was there; I did.

Q. At Senecal's once; was there any occasion when he escaped you?

A. He slipped away and we didn't know it.

Q. At Senecal's?

A. Yes, sir.

Q. What did you do about that?

A. We went and found him; he was laying out in the orchard.

Q. What did he have in his hand?

A. He had a revolver.

138 Q. What was he doing there?

A. He was laying there; we thought he was sleeping when we first went up.

Q. Did you have to rouse him?

A. Yes, sir.

Q. What did you do with him then?

A. Took him to the house?

Q. What was his condition as to being under the influence of liquor?

A. He was under the influence of whisky that day.

Q. Don't say whisky unless you mean whisky; do you mean whisky? If you do say so.

A. No; because he never drank whisky.

Q. Do you or not use whisky, when you use the word, as including all kinds of liquors?

A. No; of course I do not; but it all means the same as to making a man being in the same shape.

Q. Did he or not ever drink whisky there?

A. I never saw him drink any whisky.

Q. Now, on the Monday before he was taken sick, the week that he died, you started out what time in the morning?

A. The same time we always did—from 8 to 9 o'clock; sometimes a little later than others.

Q. Where did you go?

A. We went up the river about three miles.

Q. What did you do?

A. We didn't do anything that day.

Q. What did he do?

139 A. He laid ashore all day.

Q. Did he drink any liquor that day?

A. Yes, sir.

Q. Much or little?
A. He drank quite a lot.
Q. That is indefinite.
A. About as much as he generally drank.
Q. In quantity?
A. About a quart.
Q. Did you leave him at all?
A. No, sir.
Q. Why not?
A. I didn't want to. I didn't think he was in a shape to leave.
Q. Why wasn't he in a shape to leave?
A. Because he was under the influence of whisky.
Q. State it the way you want it.
A. He was not in shape to leave; he was intoxicated.
Q. What time did you get back?
A. About four o'clock that day.
Q. Did anything strange appear on your way back?
A. Yes, sir.
Q. What was it?
A. He rolled his eyes back in his head and looked wild, and I was a little afraid of him and got him home.
Q. Where did you take him?
A. Over to the Crossman House.
Q. Where?
A. Right in front of the bar-room.
140 Q. Did you or not have to help him out of the boat?
A. We did that day.
Q. Who do you mean by "we"?
A. Another man helped me.
Q. Who was this other man?
A. Albert Root.
Q. Did you or not think that his condition was such as to require assistance?
A. I did.
Q. How long did he stay there?
A. An hour or so; maybe longer.
Q. You with him?
A. I was staying there with him some of the time.
Q. Where did he go from there?
A. Went into the bar-room.
Q. Did you render him any assistance?
A. Yes, sir.
Q. Were you alone?
A. I was alone at that time.
Q. What did he do in the bar?
A. Took a drink.
Q. Where did he go from there?
A. In the elevator, to his room.
Q. Did anybody help in the elevator?
A. A colored boy went with him.
Q. Who was that?

A. I think this same boy. He waited on him.
Q. But it was some one?
A. Yes; there was always some one there.
141 Q. That was on Monday?
A. Yes, sir.
Q. On Tuesday did you see him?
A. Along Tuesday evening.
Q. Where was he then?
A. Out in front of the hotel.
Q. What place?
A. Right in front of the bar-room.
Q. Was it on the piazza there?
A. Yes, sir.
Q. What was his condition then?
A. About the same as it was other days; he was under the influence of whisky.
Q. Under the influence of whisky?
A. Brandy.
Q. What was his condition as to nervousness?
A. He was very nervous that day.
Q. And, as to his being excitable, what was his condition?
A. Quite excitable, too.
Q. How long were you with him?
A. An hour or so, I guess.
Q. Did he go into the bar-room while you were there?
A. Yes, sir.
Q. What did he do?
A. Had a drink.
Q. Did he ever complain of anything being the matter of his lungs?
A. He never did to me.
Q. Did you ever get any pills for him or see him get any?
142 A. I never did.
Q. Did this nervousness and excitability increase or diminish while you were there?
A. I think it increased, if anything.
Q. Now, on Wednesday, did you see him?
A. I saw him Wednesday.
Q. Where was that?
A. Up in his room.
Q. How did you come to go up there?
A. Dr. Watson came after me to go up and stay with him.
Q. Did you go up?
A. I did.
Q. How long did you stay there when you first went up?
A. Only a very few seconds.
Q. Why didn't you stay?
A. I couldn't stay in the room; that was the reason; there was such a smell.
Q. Then, where did you go?
A. I came down and told the doctor I couldn't stay in the room.

Q. Did you go up afterwards?
A. After they cleaned up the room I went up and stayed with him all day.
Q. When you went in there first did you see any bottles there?
A. I think there was two bottles there.
Q. Full or empty?
A. Empty.
Q. What kind of bottles were they?
143 A. Quart bottles; one gin and another brandy bottle.
Q. The second time you stayed with him for how long?
A. I stayed with him until noon.
Q. Then did you see him drink anything during that time?
A. Yes, sir.
Q. Did you get any liquor for him?
A. I did.
Q. What did you get?
A. I went up to Sisson & Fox's and got a bottle of whisky.
Q. What kind of a bottle?
A. A pint bottle.
Q. What did he do with it?
A. He drank it.
Q. Was this whisky?
A. Yes; this was rye whisky. They wouldn't give me any at the hotel.
Q. Did he drink it up or not?
A. He drank it up that forenoon.
Q. You stayed with him until noon; then where did you go?
A. I stayed with him while Andrew Duclone went and got his dinner, and then Andrew stayed with him while I got mine.
Q. Then did you go back in the afternoon?
A. Yes, sir.
Q. How long did you stay with him?
A. I stayed with him till dark, and I think Andrew stayed with him all night, but I am not sure.
Q. Did you see him drink anything in the afternoon?
A. Yes, sir.
Q. What did he drink?
144 A. I had part of a bottle of brandy down in the boat that had been there ever since Monday, and I took that up to him.
Q. Was there any time during that day when he said anything to you about leaving him for a time; about going down-stairs?
A. He told me and Andrew that he wanted to go to sleep, and we had better go down-stairs, and we went down and stayed about an hour.
Q. What was the condition of this brandy bottle at the time he made that request of you?
A. Quite a lot in it; it was about half full when I first took it up there.
Q. Did you go down?
A. Yes, sir.
Q. How long were you down?

A. I can't say exactly; perhaps an hour and a half, and maybe not so long.

Q. When you returned did you see this bottle there?

A. The bottle was there.

Q. What about the brandy?

A. He drinked it up. Andrew hid it there behind the chest, and when we went down he found it and drank it.

Q. Did you see him again after Wednesday?

A. I saw him on Friday night.

Q. Was he in the same room then?

A. No, sir.

Q. Was Mrs. Davy there?

145 A. Yes, sir.

Q. How long were you in the room?

A. Only a few minutes.

Q. From the time that he came there until the time that you last saw him state whether, in your opinion, there was any time when you saw him when he was not under the influence of liquor?

A. I don't think there was any time but what he was under the influence of liquor.

Q. When you went up to the room in response to Dr. Watson's request what condition was he in?

A. He was in what the doctor called a spasm.

Q. Just describe it, please.

A. He was frothing at the mouth and bleeding.

Q. What about the movements of his hands and body?

A. He was moving all over the bed.

Q. How about nervousness and excitability?

A. His eyes were rolled back in his head, and he didn't know me or any one that was in the room.

Q. What condition was his bed in—and himself?

A. Quite badly mussed up.

Q. Any indications of any blood?

A. Yes, sir; there was blood there.

Q. What was his condition, then, as to being a sick or well man?

A. He was not well.

Q. What was his condition as to sickness; was he or not a very sick man?

146 A. He was a pretty sick man, I should call him.

Cross-examination by Mr. BULGER:

Q. Where is your home, Mr. White?

A. Landsdown station.

Q. That is on the Canada side?

A. Yes, sir.

Q. How long have you lived there—how many years, about?

A. About six or eight, I guess.

Q. And you lived before that—where?

A. Rockport.

Q. That is in Canada?

A. Right in Canada; yes, sir.
Q. How long did you live in Rockport?
A. I can't tell exactly.
Q. About how many years?
A. I suppose probably 15, maybe longer.
Q. Is your best recollection and judgment now 15?
A. I lived there that long, anyway, if not longer.
Q. And before that where did you live?
A. Used to live in Mallorytown.
Q. How far is that from Rockport?
A. About ten miles.
Q. And that is also on the Canada side?
A. Yes, sir.
Q. What is your present age?
A. I am 51.
Q. Can you tell what year you were born in?
A. I was born in——
147 Q. If you had a piece of paper and pencil could you tell us, then, what year you were born in?
(No answer.)
Q. You read and write a little, don't you? We will waive that question.
A. I can write a little.
Q. Can you read ordinary print?
A. I can read print all right; yes, sir.
Q. Then tell us what year you were born in, if you can; if you can't tell us, say so. Are you able to name the year you were born in?
A. Don't be in a hurry. I can't tell just what year it was.
Q. Where were you born?
A. In Canada.
Q. What town?
A. St. John's Island.
Q. And is St. John's Island one of the Thousand Islands in the St. Lawrence river?
A. Yes; it is.
Q. Way down at the lower end?
A. No; way up above; up this way.
Q. Is that one of the American islands?
A. No; it is a Canada island.
Q. Your parents living, or either of them?
A. My father is living.
Q. Where does he live?
A. At Rockport.
Q. Your mother is dead?
A. Yes, sir.
148 Q. Have you any brothers or sisters?
A. Yes; I have two sisters and three brothers.
Q. Are you a married man?
A. I have been married, but I lost my woman.
Q. When did your wife die?

A. Three years ago.
Q. Was she your wife?
A. Yes, sir.
Q. When were you married?
A. About 30 years ago.
Q. Do you remember when you were married?
A. Yes, sir.
Q. Where was that?
A. Landsdown.
Q. Do you remember who it was that married you—performed the ceremony?
A. Yes, sir.
Q. Who was it?
A. A man by the name of Warren.
Q. Clergyman?
A. Yes, sir; clergyman.
Q. What was your wife's maiden name?
A. McNeil; Margaret McNeil.
Q. You say you have no children?
A. No, I didn't; I have 7 children.
Q. Issue of that marriage; children of that marriage?
A. Yes, sir.
Q. You have not been married since?
A. No, sir.
149 Q. Never married before?
A. No, sir.
Q. Do you live with your children or they with you?
A. Two of them live with me.
Q. How old are the two that live with you?
A. One is thirteen.
Q. Boy or girl?
A. Boy.
Q. And what is the other?
A. Eighteen.
Q. Boy or girl?
A. Both boys.
Q. Who keeps house for you?
A. We keep house ourselves.
Q. You and the two boys live alone; keep house yourselves?
A. Yes, sir.
Q. Where is that house located?
A. Right alongside of the road at Landsdown station.
Q. How far from the river?
A. About four miles.
Q. You say that your occupation in the summer is rowing people upon St. Lawrence river?
A. Yes, sir.
Q. How long has that been your occupation in the summer?
A. I can't say exactly.
Q. About how long?
A. Probably 20 years.

Q. Have you ever been convicted of any crime at any time anywhere?

150 A. No, sir.

Q. You have many times been drunk yourself, haven't you?

A. I have been, but not very often.

Q. Some eighteen or twenty times during the summer?

A. No, sir.

Q. How many times during the summer of 1880?

A. I don't know as I was drunk at all.

Q. Will you swear you were not drunk in 1880?

A. I can't say how many times.

Q. In 1881 how many times were you drunk?

A. I don't think that is hardly a fair question to put to a man.

Q. How many times were you drunk according to your best recollection in the summer of 1881?

A. I don't know as I was drunk at all.

Q. Will you swear you were not drunk?

A. I won't swear I was drunk or was not drunk.

Q. Why won't you swear whether or not you were drunk? Was it because you don't know or because you don't want to tell?

A. Might have been drunk once or twice; I don't know now.

Q. Weren't you drunk a dozen times?

A. No, sir.

Q. Did you own the boat you rowed?

A. Yes, sir.

Q. Where did you keep that boat?

A. Kept it in the boat-house.

Q. Where was the boat-house?

A. Down on the river; used to keep it at home, at Rockport, when I was home.

151 Q. How did you get it four miles to the river? Where did you live when you first saw Mr. Davy?

A. At Rockport.

Q. What year was that, to your best judgment and recollection?

A. It was quite awhile ago.

Q. I asked your best judgment as to what year it was; your best recollection when you first saw him to know who he was.

A. It was 15 or 16 years ago, 15 anyway.

Q. At that time you lived at Rockport?

A. Yes, sir.

Q. Where was he when you first saw him to know him?

A. At Alexandria Bay.

Q. At what particular place? It is a large place.

A. I saw him at the Crossman House.

Q. 15 or 16 years ago?

A. Quite awhile; 15 I should say.

Q. Do you know when the Crossman House was built?

A. They used to have one a good many years ago.

Q. Do you know when the hotel they call the Crossman was built?

A. 15 years ago this one was built they have now.
Q. Did they used to have a hotel called the Crossman?
A. Yes; been there 50 years.
Q. Of that you are certain?
A. I think so.
Q. And it was called the Crossman House 15 or 18 years ago?
A. Yes, sir.
Q. Do you know who kept the hotel?
A. Mr. Crossman.
152 Q. Which Crossman? What was his Christian name?
A. Be darned if I know. I have been acquainted with him a good while, too. I always called him Mr. Crossman, and most every one else does.
Q. Will you swear there was a hotel there called the Crossman before this present hotel was built?
A. Yes, sir.
Q. And kept by a man named Crossman?
A. Yes, sir.
Q. Where was Mr. Davy when you first saw him at that old Crossman House, when you first set eyes on him?
A. It was on the river.
Q. It was not at the Crossman House?
A. I can't tell exactly——
Q. Now, Mr. White, you now say that you did not see him first at the Crossman House?
A. I saw him around there.
Q. Did you see him first at the Crossman House or on the river?
A. At the Crossman House and afterwards on the river.
Q. Didn't you see him first on the river?
A. There is where I got acquainted with him.
Q. How did you become acquainted with him?
A. When I was rowing a man named Williams, from New York, and he came to dinner. He came to take dinner with Mr. Williams and I was rowing Mr. Williams and that was the way I became acquainted with Mr. Davy.
Q. Where did you go to dinner that day?
A. I think on Pool's Island.
153 Q. Are you sure it was on Pool's Island?
A. I think so.
Q. Was it at a hotel?
A. No, sir.
Q. Farm-house?
A. No, sir.
Q. What was it?
A. Took our dinner with us and cooked it on the island.
Q. And that was about 15 years ago?
A. I won't say for sure.
Q. Do you remember what month it was?
A. No, sir; I do not.
Q. Have you any idea what part of the season?
A. I presume in July or somewhere along there.

Q. At that time you were a drinking man yourself, were you not?
A. I might take a glass of whisky.
Q. About how often in the day?
A. I couldn't tell you; maybe some days I wouldn't take it for months or weeks.
Q. Do you know what time Mr. Davy stayed there, how much of the season he stayed there that year?
A. I don't remember now.
Q. Do you remember whether or not you rowed him on the water that season?
A. I rowed him in September of that year some.
Q. 15 years ago?
A. I don't say exactly 15 years ago.
Q. You have been sworn in this action how often before
154 this, three times?
A. No; I don't think so; twice, I think.
Q. When did you come to Watertown on this occasion for the purpose of giving your testimony here to-day?
A. Yesterday.
Q. And where did you remain last night?
A. At the hotel.
Q. What hotel?
A. Globe Hotel.
Q. Have you read the minutes of your testimony on the trial since you came to Watertown?
A. Yes, sir.
Q. How did you come to go to the Globe? What led you to go to the Globe? All the other witnesses stop there?
A. Yes; they stopped there.
Q. Was the testimony read aloud to all the witnesses?
A. Not that I heard.
Q. Did you read it yourself?
A. Yes, sir.
Q. Did you read it from a book like this (showing book)?
A. Yes, sir.
Q. Did you read it all through your testimony?
A. No; not quite.
Q. How much of it did you read?
A. Pretty near to the last of it we read.
Q. Won't you please give me the number of the page at which you commenced and the number of page at which you quit reading? Take it and turn it over and tell me where you commenced.
A. I won't do it.
155 Q. Why won't you do it?
A. Because it is not necessary.
Q. Is that the only reason you will give me for not doing it? I think you should do that.
A. I don't see as there is any use of it.
Q. Why won't you answer it?
A. Because it isn't necessary.

Q. Is that the only reason you want to give for not answering? Give any explanation that you please why you won't answer.

(No answer.)

COMMISSIONER: Any other reason why you decline to answer?

WITNESS: No, sir.

Mr. BULGER: Don't you know you can't read at all?

A. Yes; I can read. I am not a very good reader, but I can read.

Q. Can you pick out your name in the testimony book?

A. I guess so.

Q. You think you can do that. Is that the answer?

A. Yes; I can. I can write my name, too, so far as that goes.

Q. You say that you rowed Mr. Davy upon the river in the fall of the season when you first saw him?

A. Yes, sir.

Q. Do you remember any other gentleman that occupied the boat at any time during September?

A. I do; Mr. Van Horn. He was with him.

Q. What Van Horn?

A. Abram Van Horn.

Q. How long ago is that—15 years? Your best recollec-
156 tion is that it was 15 years?

A. I think it was about 15 years ago.

Q. You saw with him on one occasion Mr. Abram Van Horn—of what place?

A. Lives in Jersey City, I think.

Q. Any one else?

A. Mr. Clark.

Q. What is his Christian name?

A. Mr. James Clark.

Q. And he was from what place, if you know?

A. I don't know. He never was in the boat with me so much as Mr. Van Horn.

Q. When did you see Mr. Davy the second season that you knew him? Did he come to the river the next season after you first saw him?

A. I think he did.

Q. Don't say you think. Do your thinking to yourself and then answer the question. What is your answer to the question as to whether or not you saw Mr. Davy on the St. Lawrence river the next season after that September?

A. I think he was there the next season.

Q. Are you sure he was there the next season?

A. I won't swear he was, but I think he was.

Q. And was he there the next season after that—the second season after the one when you remember that you first saw him?

A. There was one or two seasons I didn't row him.

Q. What hotel did he stop at the first season you saw him?

A. He didn't stop at any hotel; he stayed at Mr. Rock-
157 well's. He was a preacher.

Q. What island was that?

A. No island; it was up in Alexandria Bay.

Q. What did you say Mr. Rockwell was?
A. He was a minister.
Q. Of the Gospel?
A. Yes, sir.
Q. And the next season you think he was there, but would not be sure?
A. I wouldn't be sure, but I think so.
Q. Where did he stop at the next season you do remember?
A. At the Crossman House.
Q. At the old Crossman House, not the present building?
A. Yes, sir.
Q. You were an oarsman on the river at that time?
A. Yes, sir.
Q. How many boats did you own?
A. Only one.
Q. Did you row Mr. Davy that season, that third season after you became acquainted with him?
A. I don't know whether I did or not.; there was one season Joe Edgley rowed him.
Q. You don't know whether you rowed him or not the third season?
A. No; I am not sure; there was one season I didn't row him.
Q. How many years or what year was it after the first when you got acquainted with him that you do remember that you rowed him? Was it the 4th, or 5th, or 6th, or 7th?
158 A. I can't tell you.
Q. Have you any judgment or recollection as to what season it was after the time you became acquainted with him?
A. No; I can't tell you.
Q. What season after the first can you recall that you did row him and be positive about it; after the season in which you first became acquainted with him?
A. I rowed him in 1881. That is certain. That was the last year he was there.
Q. Is that the first year you can remember you did row him and be positive of it?
A. I can't tell you, because I never kept any track of it.
Q. Is 1881 the first season that you can recall and be positive about it that you did row him after the season of your first acquaintance?
A. No, sir.
Q. Is that the first season after 1881; is the year 1881 the first you remember that you rowed him after the first year you rowed him?
A. I can't give the year I rowed him.
Q. You remember that you rowed him about 15 years ago?
A. Yes; somewhere along there.
Q. Is the first year you remember you rowed him after that the year 1881?
A. Yes, sir; somewhere along there. No; do you mean the next year?

Q. When is the first year you remember after that first year; was it 1881?

A. No, sir; it was not.

159 Q. If 1881 was not the first when was it?

A. I rowed him the next year.

Q. You are sure of that?

A. Yes, sir.

Q. And the next year after that you rowed him?

A. I think I rowed him the three first years he was here.

Q. You rowed him in July and September the first year you got acquainted with him?

A. No; I didn't row him in July. I was rowing Mr. Williams; that was when I got acquainted with him.

Q. Didn't he come over on the island and have dinner?

A. Yes; but he rowed himself.

Q. The next season you remember you rowed him?

A. Yes, sir.

Q. Where was he staying then?

A. At the Crossman House; he always stopped there then.

Q. And the next season?

A. I think I did.

Q. How about the fourth season? Did you row him then?

A. I am not sure; there was one season he missed.

Q. And you rowed him in 1881; you remember that distinctly?

A. Yes, sir.

Q. Did you row him the year before that, 1880?

A. No; I don't think I did.

Q. Did you row him the year before that, 1879?

A. I think I did.

Q. Where did he stop in 1879?

A. At the Crossman House; he always stopped there.

160 Q. You are sure he stopped at the Crossman House in '79?

A. I know he always stopped there.

Q. What do you say as to whether he stopped there in '79?

A. I can't say; I wouldn't be sure.

Q. Did you know him in 1878?

A. I knew him to see him then as well as any other time.

Q. Did you know him in 1878?

A. Yes, sir.

Q. Did you ever know his wife, Mrs. Davy?

A. I did.

Q. When did you first see her there?

A. I can't tell you.

Q. Did you see her there during the first season when you first saw him?

A. No, sir; I did not.

Q. Did you see her the next season after that?

A. I never saw her until after she was married to him.

Q. Do you know when she was married to him?

A. I don't know what time, but I know he was not married the first year——

Q. Was she there in 1881—during the season of 1881; did you see her there?

A. Yes; I saw her there.

Q. When first that season?

A. On Wednesday night.

Q. During the week of his death?

A. Yes, sir.

Q. That was the first you saw of her?

A. Yes, sir.

161 Q. Was she there the season before that?

A. I am not sure whether she was or not.

Q. You rowed Mr. Davy in 1880, the year before he died. Was not his wife with him during that season?

A. I am not sure.

Q. You say you rowed him in 1879. Was Mrs. Davy with him in 1879?

A. I don't remember about that.

Q. Did you see Mrs. Davy there during any season except the season when he died?

A. Yes, sir.

Q. When was that?

A. I can't tell you.

Q. How many seasons did you see her there?

A. One or two seasons.

Q. Where did Mr. Davy stop when she was with him?

A. At the Crossman House.

Q. When you rowed on the river it was your custom to go home at night.

A. Sometimes I went home; sometimes I did not.

Q. In 1880 what proportion of the time, counting the nights along, did you go home nights?

A. Sometimes two or three times and sometimes not the whole week, but generally two or three times a week.

Q. Did you pursue your work upon the river on Sunday?

A. Sometimes I did.

Q. And some Sundays you were at home?

A. Yes, sir.

162 Q. And that was about the average way in which you worked?

A. Yes, as a general thing.

Q. During all the years on the river?

A. Yes, sir.

Q. In 1881 do you remember what time Mr. Davy first came to the islands?

A. Along the last of the July.

Q. The last days of July?

A. Along the last. I rowed him ten days, and he died the 6th of August.

Q. Hadn't he been there some time before you began rowing him?

A. No, sir.

Q. How do you know that?

A. I rowed him the first day he got there. He got there at night, and I rowed him the next day.
Q. What day of the week did he get there?
A. I think it was on Saturday.
Q. Is that your best recollection now, that it was Saturday?
A. I think it was.
Q. Do you remember what hour of the day it was when he arrived?
A. Just after dark.
Q. Did he come by boat or train?
A. By boat.
Q. Do you remember the name of the boat that brought him?
A. No; it was one of the boats that run from Cape Vincent or Oswego or Clayton.
Q. Do you know where he came from?
163 A. No, sir; I do not.
Q. Come alone?
A. Yes; I suppose he came from home; I didn't know.
Q. You saw nobody with him?
A. Nobody with him.
Q. He got there about 7 o'clock in the evening?
A. About that time.
Q. Then he came up on a day boat down the river?
A. Afternoon boat, that didn't get there until just dark.
Q. Where was he when you first saw him—getting off the boat?
A. Yes, sir.
Q. Did you speak to him or he to you?
A. We always spoke.
Q. Which spoke first that night?
A. I don't remember.
Q. Shook hands with him?
A. Yes, sir.
Q. Called you by name?
A. Yes, sir.
Q. And was looking about as well as usual, wasn't he?
A. No, sir; he was not.
Q. Was not looking as well as during the season before?
A. No, sir.
Q. Was he thinner in appearance or fleshier?
A. Fleshier.
Q. That was Saturday. Where did he go after he got upon the dock?
A. To the hotel.
164 Q. Did you go with him to the hotel?
A. Walked up behind him.
Q. How did you come to go behind him? Did he ask you to walk up to the hotel?
A. No; he didn't ask me to.
Q. How did you come to go up to the hotel?
A. I went up on purpose to see him.
Q. You followed him up to the hotel on purpose to see him?

A. Yes, sir.
Q. Through which door did he enter?
A. I think he came around——
Q. Did he go up the main walk?
A. He came around, I think, by the upper end of the house. There is a path comes around a little higher that way.
Q. Do you remember distinctly that he did take that path?
A. I think he did; pretty sure.
Q. Did you go right along behind him?
A. Yes, sir.
Q. What part of the hotel did he enter first?
A. Went in the front door.
Q. Main entrance?
A. Yes, sir.
Q. Did you go in, too?
A. I went in.
Q. Where did he go after entering?
A. Went right to the office.
Q. Was that the east entrance of the hotel?
A. No, sir; on the south side of the hotel.
165 Q. That is the office side, isn't it?
A. It was the south side of the hotel.
Q. The entrance that leads directly to the office?
A. Yes, sir.
Q. The office is on the south side of the hotel, then, isn't it?
A. Yes, sir.
Q. He entered that door and went directly to the desk?
A. Yes; he went right to the office.
Q. Did he register his name upon the hotel register?
A. I don't know whether he did or not.
Q. You stood right behind him?
A. I didn't stand right behind him.
Q. You stood beside him?
A. I stood there, but he was at the office quite a bit before me, you know.
Q. Who was the clerk in charge of the office at that time?
A. I forget which clerk it was.
Q. You know, or did know at that time, all the clerks about that hotel?
A. Perhaps this year there would be one and another year another.
Q. You are unable, then, to tell what clerk this was in charge of the office that year?
A. I can't tell you.
Q. Can you give the name of any other persons who was present besides yourself and Mr. Davy at the desk?
A. There was a lot of oarsmen there.
Q. Do you know the name of some one that was there?
166 A. Young Crossman, Charlie.
Q. Son of the landlord?
A. Yes, sir.

Q. Was he in the office?
A. Yes. Charlie is the one that always tends to the register.
Q. What did Mr. Davy say when he walked up to the register or desk?
A. I don't remember.
Q. Did the Crossmans speak to him?
A. Of course they did.
Q. What did they say?
A. I think they shook hands.
Q. Do you know they did?
A. I think so.
Q. Can you remember anything that Mr. Davy said to the Crossmans, or that either of the Crossmans said to him?
A. No, sir.
Q. Not a word?
A. No, sir.
Q. How long did Mr. Davy stay there at the office?
A. A few minutes.
Q. Five or ten minutes?
A. No; I don't think that long.
Q. How long?
A. Perhaps five minutes.
Q. Can't you tell what he did or said or anything that he did or said during that five minutes?
A. No, sir.
167 Q. Did you stand near by?
A. I wasn't right close to him.
Q. Within how many feet?
A. Five or ten.
Q. Were both the Crossmans there—father and son?
A. I don't remember the old man was there; I don't think he was. I remember the young man was there. He always tended to the office.
Q. Where did Mr. Davy go after he left the office?
A. Into the bar-room.
Q. Did he speak to you while he stood at the desk?
A. Yes, I went up and shook hands with him again.
Q. Do you know a C. Mattoon—this gentleman here?
A. Yes, I have seen him.
Q. Was he there?
A. I don't remember seeing him there.
Q. Will you swear he was not there?
A. I don't remember seeing him.
Q. I refer to the time he walked up the path to the desk.
A. I don't remember seeing him.
Q. Into what room did Mr. Davy go from the hotel office that night?
A. He went into the bar-room.
Q. Is that the room adjoining the office?
A. Yes, sir.
Q. Next to the office?

A. Not next to it; you have to go through an alley.
Q. And when he went to the bar-room who went with him?
A. I went with him.
168 Q. Who else; did the colored boy go, too?
A. No, I don't think it.
Q. What is the colored boy's name?
A. I forget.
Q. Your recollection is that the colored boy didn't go to the bar-room?
A. I don't recall him; he might have.
Q. When Mr. Davy went to the bar-room what took place?
A. We had a drink and he went to his room.
Q. Did you have a drink, too?
A. Yes, sir.
Q. What did you drink?
A. I don't remember.
Q. What did he drink?
A. I can't tell you; I didn't taste it.
Q. What did you call for?
A. I don't remember.
Q. What did he call for?
A. I don't remember that.
Q. Did he meet any other gentleman there that he seemed to know that he spoke to or shook hands with?
A. He might, some of the oarsmen; I don't remember that.
Q. How long did he remain in the bar-room?
A. I can't tell you exactly.
Q. Your best judgment as to the length of time he stayed in the bar-room?
A. I can't tell you.
169 Q. You have no recollection as to how long he stayed in the bar-room?
A. No, sir; I have not.
Q. This was about how long after dark?
A. It was just after dark when the boat came in. It was not a great while; probably seven o'clock, and might have been a little earlier.
Q. What was the light used there to light the house in front of the house—the yard? Do you know?
A. They have torch light and every kind.
Q. What kind that night?
A. I didn't notice.
Q. They were burning as usual when the boat left?
A. I think they were.
Q. Where did Mr. Davy go after he went out of the bar-room next after going out?
A. I suppose he went up to tea.
Q. I want to know what you know about it?
A. I don't remember.
Q. Do you know where he went from the bar-room?
A. No; I don't remember.

Q. Did you see him again that night?
A. No; I don't think I did.
Q. Where did you stay that night?
A. I stayed over to the camp where we were camping.
Q. Where was that?
A. Over on Well's Island, as I told you.
Q. How far from the Crossman House?
170 A. Three-quarters of a mile.
Q. Who stayed with you?
A. Fred. Lamon was one. He and I camped together.
Q. Did he go over with you from the Crossman House that night?
A. Yes, sir.
Q. What time did you go over to the island?
A. I can't tell you.
Q. Was it before midnight?
A. I don't think it——
Q. Was it before midnight?
A. Yes, sir.
Q. Where did you go the next morning on starting out?
A. We went to Rockport.
Q. How far from the Crossman House?
A. Three miles and a half.
Q. You left Well's Island and came directly to Rockport?
A. No; I came to the bay first.
Q. Whereabouts to the bay?
A. To the Crossman House.
Q. What time did you get there?
A. About 7 o'clock.
Q. Are you sure you got there as early as 7 o'clock?
A. Yes, sir.
Q. Did you go into the Crossman House?
A. Yes, sir.
Q. What part of the hotel did you enter first?
A. I always go into the office.
Q. Did you go into the office that morning?
171 A. Yes, sir.
Q. Did you see Mr. Davy there?
A. I saw him after a while.
Q. How long had you been there before he appeared?
A. I can't tell you exactly.
Q. How long do you think?
A. I don't remember; that is a good while ago.
Q. Have you any recollection as to how long you were there before he appeared?
A. No; I don't remember.
Q. Did he appear at all?
A. Yes, sir.
Q. Did he speak with you?
A. Yes, sir.
Q. And did you and he go to the dock and get into the boat?
A. Yes, sir.

Q. The first thing?
A. Not right off.
Q. He hadn't been to breakfast?
A. No, sir.
Q. Did you wait for him?
A. He always came down before breakfast.
Q. Do you remember what he did that morning?
A. He came down before breakfast into the office.
Q. And then you waited for him until he had breakfast?
A. Until he got ready to go.
Q. When he came out of the breakfast-room you and he went away together?
172 A. Yes, sir.
Q. Anybody go with you?
A. No, sir.
Q. Where did you go?
A. Over to Rockport.
Q. Did he fish on the way down?
A. No, sir.
Q. Sat in the boat and talked with you?
A. Yes, sir.
Q. Did he complain of being ill that morning on the way down?
A. No; he did not to me.
Q. About how tall a man was he at that time?
A. I can't tell you.
Q. Your best judgment as to his height?
A. Quite a bit taller than I.
Q. Put it in feet and inches; your best judgment as to his height?
A. I can't tell you.
Q. Have you any judgment as to his height? If so, state.
A. I should think about 5 feet nine.
Q. What was his weight at that time, in your judgment?
A. I don't know.
Q. What is your best recollection as to his weight?
A. I can't tell you how heavy he was.
Q. Have you any judgment as to his weight?
A. No; I have not.
Q. Describe his face as to whether or not he wore whiskers.
A. He wore whiskers.
Q. Chin whiskers or side whiskers?
173 A. He had big full whiskers.
Q. Beginning around here back of the ears?
A. He had full whiskers.
Q. Was any part of the face shaved?
A. I don't think it.
Q. Full whiskers and mustache?
A. Yes, sir.
Q. And how was he dressed as to the color of his clothing; was he dressed as Mr. Strong is dressed, or was his clothing of some other color?
A. I don't remember.

Q. Have you any recollection as to the color of his clothing that morning?
A. I think he had dark clothes on.
Q. Have you any recollection?
A. No, I can't tell exactly.
Q. Then you don't know whether his clothing was dark or light in color?
A. No, sir.
Q. Or heavy or light as to the quality of the goods?
A. No, sir.
Q. Don't know anything about that?
A. No, sir.
Q. Which did he wear, hat or cap?
A. I don't remember; he generally wore a hat, though.
Q. What did he carry with him—an umbrella?
A. I don't know whether he did or not.
Q. You don't remember that he had anything, then—have any fishing tackle with him?
174 A. No, sir; we didn't carry any fishing tackle that day.
Q. Talk and visit with you all the way over to Rockport?
A. Yes, sir.
Q. When you got to Rockport did you land; where did he go to, what house?
A. Lear's house.
Q. That is the house in which Mr. Lear lives with his family?
A. Yes, sir.
Q. Wife and child?
A. Wife and two children.
Q. What time did you land there at his place?
A. I don't remember just what time it was.
Q. About what time of day?
A. Probably about 9 or 10 o'clock.
Q. How long did it take you to row your boat over there?
A. It didn't take over an hour anyway.
Q. Did you go up to the Lear house with him?
A. Yes, sir.
Q. Is that the name it is known by?
A. Island View House.
Q. Did you go into the house with him?
A. Yes, sir.
Q. Did he walk with you?
A. Yes, sir.
Q. Anybody there?
A. No, sir.
175 Q. Upon entering what persons did you see?
A. I can't say.
Q. Can you name anybody that was there?
A. Mr. Lear was there.
Q. Can you name anybody else?
A. No, sir; I cannot.
Q. Where did you go when you went into the house?

A. Bar-room.
Q. Who led the way, you or Mr. Davy?
A. I don't remember.
Q. Which came out first, you or he?
A. I most generally went out first.
Q. If you remember, say so; if not, say so.
A. I don't remember.
Q. Who drank first, you or he?
A. I don't remember that.
Q. Did you drink anything in the bar-room that morning at the Island View House?
A. I don't remember what I did——
Q. Did Mr. Davy drink anything?
A. I can't tell whether he did that morning or not.
Q. Do you know whether or not he was accustomed to smoke?
A. Quite a bit.
Q. And you were a smoker at that time?
A. Yes, sir.
Q. Do you remember whether or not he purchased a cigar or a number of cigars there that morning?
A. I think he did.
176 Q. Do you know whether he did or not?
A. I am not certain. I won't swear.
Q. Do you know how long he and you stayed in the bar-room?
A. Quite a little while.
Q. How long in hours and minutes?
A. Maybe three-quarters of an hour; maybe longer.
Q. Where did you go to when you went from there?
A. Over to this other house where Mr. Davy used to go and lay down.
Q. How far from this bar-room?
A. About five rods; maybe not so far as that.
Q. What kind of a house was that; occupied by anybody?
A. Mr. Lear occupied it.
Q. Sort of an annex to his principal place?
A. Yes, sir.
Q. You and Mr. Davy went over there together?
A. Yes, sir.
Q. What did he do—lie down?
A. Yes; and I went back to the hotel and sat around there.
Q. Where did he lie down—in what room?
A. Corner room?
Q. No; private or public room.
A. Private bed-room.
Q. Did you go to the room with him?
A. Yes, sir.
Q. You saw him when he laid down.
A. Yes, sir.
Q. Did he undress?
A. No, sir.
177 Q. Simply lay on the bed?

A. Yes; just laid on the bed.
Q. Where did you go after he laid down?
A. I went back to the hotel and stayed a little while and went back over there again to see how Mr. Davy was.
Q. You say he was feeling well that morning; you don't mean to say now that he was sick?
A. I never left him very much; I stayed around to see him.
Q. What do you mean by saying that you went back to see how he was since he was well when you left him?
A. I went back to see if he was all right or not.
Q. What reason have you to suspect he was not all right if you have sworn he was well?
A. Well, he hadn't been very well.
Q. Since when? You had only seen him the night before?
A. He didn't look very well, and he just laid down a little while, and I went over to the hotel and came back to see him, and when I came back he was asleep.
Q. Then you went back to Mr. Lear's place proper. When did you next see Mr. Davy—what hour of the day?
A. Maybe it was an hour or so; perhaps not quite so long.
Q. What time of the day would that be?
A. About 12 o'clock.
Q. Did he get up then?
A. Yes, sir.
Q. And you and he went away?
A. No; he got his dinner first.
178 Q. You and he go to dinner together?
A. Yes, sir.
Q. Sit at the same table with him?
A. Yes, sir.
Q. Remember anybody present at the dinner table aside from you and Mr. Davy?
A. No, sir; I do not.
Q. And after dinner you went back to the dock and went over to the bay?
A. Yes, sir.
Q. Mr. Davy was feeling about as well, so far as you could observe, on the way back as when you brought him down to Rockport?
A. He appeared to be about the same; not much difference.
Q. When you brought him to the Crossman House dock?
A. Yes, sir.
Q. And he got out of the boat and went up to the hotel alone?
A. He did that day.
Q. When did you next see him?
A. Monday morning.
Q. This was Sunday, was it?
A. I think it was on Sunday.
Q. Can you be sure about that?
A. I am pretty sure, but not certain.

Q. Your recollection is that he came there on Saturday evening, and this was Sunday you have been talking about?

A. I think it was Saturday.

179 Q. Saturday that he came and Sunday you had him over Rockport?

A. I think it was, but I would not be certain.

Q. You didn't see him again until next morning. What day of the week was that?

A. I can't tell exactly.

Q. Where was he when you saw him next morning?

A. At the Crossman House.

Q. The Crossman House is quite a large hotel. Where was he in the house?

A. In the reading-room.

Q. Was he reading?

A. No, sir.

Q. What was he doing?

A. He always generally——

Q. Tell us what he was doing in the reading-room when you first saw him that morning.

A. He had just come down-stairs.

Q. Was he seated or standing?

A. He was standing up.

Q. Did he have his hat on?

A. Yes, sir.

Q. What kind of a hat did he have on?

A. I don't remember.

Q. But you are sure he had it on?

A. Yes, sir.

Q. Was it white or black?

A. I can't remember.

Q. Did you and he speak?

180 A. Yes, sir.

Q. Do you remember what was said?

A. No; I do not.

Q. Do you know whether or not he had been to breakfast?

A. I think he had not been to breakfast.

Q. Do you know?

A. I don't remember.

Q. You have no recollection as to how it was?

A. No, sir.

Q. How long did you remain there in the reading-room with him?

A. Just a few minutes.

Q. Where did you go then?

A. To the bar-room.

Q. He always went to the bar-room when he saw you, didn't he? As soon as Mr. Davy saw you he went right off to the bar-room and you followed him?

A. Yes; and I went with him.

Q. He always——

A. No, sir; not always.

Q. Almost always?
A. No, sir.
Q. Whenever he drank you drank with him?
A. No, sir; not always.
Q. Did he ever ask you to drink during those ten days that you refused?
A. Yes, sir.
Q. How often did you refuse when he asked you to drink?
A. I can't tell you.
181 Q. More than once?
A. Yes, sir.
Q. You like whisky, don't you?
A. I don't know as I do.
Q. You drink whisky every day, don't you?
A. No, sir; I do not.
Q. You generally take some, don't you?
A. I oftener go without it for some time.
Q. When he went to the bar-room with you you did drink sometimes?
A. I did.
Q. Did you on this day?
A. I don't remember.
Q. Did Mr. Davy call for anything on this day?
A. He did. He called for a gin cocktail.
Q. Did you call for anything?
A. No, sir.
Q. What did he drink this particular morning?
A. I don't know.
Q. Then you don't know what he called for that morning?
A. No; I do not.
Q. Then did you and he go away from the bar-room?
A. Yes, sir.
Q. Where did you go to?
A. Walking around outside for awhile.
Q. Did you finally go down to the river?
A. Yes; I guess we did; I am not certain whether we did or not just then.
182 Q. Did you go on the river at all that day?
A. Yes, sir.
Q. What time of the day, with Mr. Davy?
A. As I told you, we always went about just such a time every morning.
Q. What time did you go that morning?
A. I can't tell you just exactly.
Q. You think you went before noon—before eleven?
A. Before that.
Q. Before ten?
A. I can't tell you just exactly what hour we went *hour*.
Q. What time did you go?
A. I don't remember.
Q. Do you remember where you went to that morning?

A. I don't know.
Q. Do you know who was with you that morning?
A. Mr. Davy.
Q. Are you sure he was with you that morning when you went out on the river?
A. Yes, sir.
Q. Can you tell what clothing he had on that morning?
A. No; I cannot.
Q. Can you tell the color of clothing he wore that morning?
A. No, sir.
Q. Can you tell whether he wore a cap or hat that morning?
A. No, sir.
Q. Can you tell whether his hat or cap was black or white?
A. No, sir; I can't tell you.
183 Q. Have you any recollection?
A. No, sir.
Q. Did he have an overcoat on?
A. I can't tell you.
Q. Didn't he have a light-colored overcoat on?
A. I can't tell.
Q. Where did you go that morning; that was the next day after you were over to Rockport, where Theodore Lear has a house?
A. I don't remember where we did go that day.
Q. What time did you get back to the Crossman House?
A. About six o'clock.
Q. Do you know where you came from to the Crossman House, or can't you remember?
A. I don't remember just exactly.
Q. At that time Mr. Davy went up to the hotel himself, didn't he? Didn't he get out of the boat and walk up to the Crossman House alone?
A. I don't remember whether he did or not.
Q. Do you know what you did after he got out of the boat that night?
A. No; I do not.
Q. You didn't see him again that night?
A. I don't remember whether I did or not.
Q. Did you see him the next day?
A. Yes, sir.
Q. Do you remember where you saw him first in the morning?
A. I don't remember just where I saw him.
184 Q. Do you remember what hour of the day you saw him next morning?
A. I don't know.
Q. Do you know where it was that you met him next day first?
A. At the Crossman House.
Q. Whereabouts in the Crossman House?
A. I don't remember.
Q. Now, do you know whether you and Mr. Davy went out on the river next day?
A. I think we did.

Q. I ask you if you know.
A. I was out every day with him——
Q. Did you go out the next day?
A. Yes, sir; I did.
Q. What time did you go out with him?
A. About the usual time.
Q. What time was that?
A. About three o'clock.
Q. Where did you go on this particular day?
A. I don't remember.
Q. What day of the week was it?
A. I can't tell you that.
Q. How long were you out that day before you returned with Mr. Davy to the Crossman House?
A. About six o'clock.
Q. You remember distinctly that you came back at six?
A. I came back every night about that time.
Q. I am talking about this third day.
185 A. I don't remember.
Q. Do you know where you came from to the Crossman House when you returned? Where had you last touched shore before you landed at the Crossman House?
A. I can't tell you. I don't remember.
Q. When you landed where did he go?
A. Up to the hotel.
Q. Where did you keep your boat that night?
A. I don't remember that.
Q. Did you go home that night?
A. I can't tell that.
Q. Don't remember whether you did or not?
A. I don't know.
Q. If you did go home, what time did you get back the next morning?
A. About seven.
Q. You walked four miles across country?
A. No; I didn't. I wasn't living there at that time. I was living at Rockport.
Q. You don't know whether you went home that night or not?
A. I am not certain.
Q. What time did you get up to the Crossman the next day?
A. About seven.
Q. How long did you remain there before you saw Mr. Davy that morning?
A. I can't tell that exactly.
Q. Have you any recollection whatever about it?
A. No; I don't remember.
186 Q. Did Mr. Davy appear at all that day to you?
A. Yes, sir.
Q. What day of the week was that?
A. I don't remember what day.
Q. What day was it, as compared with the first day when you

saw him that Saturday night; was it the second, third, fourth, or fifth?

A. I don't remember.

Q. What time of day did he appear or what time of day did you and he go out on the river?

A. Somewheres about eight o'clock.

Q. Have any fishing tackle?

A. I had my own tackle.

Q. Did he fish?

A. A little, not very much.

Q. Where did you go?

A. I don't remember.

Q. Where did you touch shore after leaving the Crossman House on that day?

A. I can't tell you.

Q. Can't name the place, can you, or any place on that day?

A. I can't tell you the different days where we went.

Q. Can you remember anything that you did that day except to go out with Mr. Davy?

A. No, I don't remember what we did that day.

Q. Can you remember what time you returned to the Crossman House that day?

A. No, sir.

187 Q. Do you know whether or not you returned at all?

A. Yes, sir.

Q. How do you know that?

A. We never stayed away any nights; that is the reason.

Q. Is there anything that fixes the fact in your mind that you did or did not return that day?

A. I think we returned.

Q. That is all you know about it, what you think about it?

A. I know we came back.

Q. You don't know what time you came back?

A. Not for certain.

Q. And you left Mr. Davy on the dock?

A. Always went up with him to the house, as a general thing.

Q. That is all you know about it, what you think about it?

A. I know we came back.

Q. You don't know what time you came back?

A. Not for certain.

Q. And you left Mr. Davy on the dock?

A. Always went up to the house with him, as a general thing.

Q. I didn't ask you what you always did. He got out of your boat on the Crossman House dock?

A. Yes, sir.

Q. Did you walk up with him or did he go alone?

A. I went with him.

Q. Where did he go?

A. To the hotel.

Q. Did he go in?

A. He did.

188 Q. Did you follow him?
A. Yes, sir,
Q. Where did he go after he went in?
A. I don't remember.
Q. Where did you go in there?
A. I don't remember.
Q. How long did you stay in there?
A. I don't remember.
Q. Where did you go when you came out?
A. I don't know.
Q. Can you name any particular person you saw in the hotel aside from Mr. Davy?
A. No; no particular person.
Q. Can you tell what time of day it was when you went in?
A. It was near night.
Q. What time of day by the clock?
A. I don't know.
Q. Did you have a watch or time-piece of any kind with you?
A. No, sir.
Q. Can you tell the time of day by a clock or watch?
A. Yes, sir; Mr. Davy generally had a watch with him.
Q. You came out after a time and did not see Mr. Davy again that night?
A. I don't remember whether I did or not.
Q. The next morning did you see him?
A. Yes, sir.
Q. About what hour of the day, and where?
A. Down at the Crossman House.
189 Q. Name the room where he was.
A. I can't do that.
Q. Then you don't know where you saw him?
A. Saw him there at the house.
Q. Where?
A. I can't tell just what place.
Q. You don't know just where?
A. No, sir.
Q. What is it that fixed it in your memory that you saw him in the house at all?
A. I generally saw him every morning, except he got sick and didn't come out.
Q. What is there that fixes it in your mind that you saw him that morning in the Crossman House, if anything?
A. I can't give any other answer than I have.
Q. That is all you know about it—nothing except what you know—what his general habit was in that particular?
A. Yes, sir.
Q. When you speak of what he generally did you speak of that he had been doing for three or four days, or what he had done the year before?
A. Three or four days.
Q. And without reference to his habit the previous year?

A. No, sir.
Q. Well, did he go out upon the river with you that day?
A. I think he did.
Q. And if he went out on the river with you, where did you take him to?
190 A. I don't remember just where we went.
Q. Do you remember his coughing while in the boat, severely, on the occasion of any of these trips that you have described?
A. I don't remember his coughing.
Q. You have no recollection of the matter?
A. No; I have not.
Q. Do you know whether he did or not?
A. I have no recollection of it.
Q. Did he have a hemorrhage of the lungs while he was in your boat during this week?
A. No, sir.
Q. And throw up blood?
A. Never saw any; none in my boat.
Q. Wasn't there blood in your boat on one occasion during this week which came from his mouth?
A. Not that I know of.
Q. Will you swear there was not?
A. I don't remember seeing any.
Q. Will you swear there was not?
A. No; I won't, because I don't remember whether there was or not.
Q. On this last day that we are talking about how long did you keep him out before you brought him back to the Crossman House?
A. The last day?
Q. No; the day we are talking about. You know that he came there Saturday night and you had him over to Lear's Hotel, the Island View House, on Sunday?
191 A. Yes, sir.
Q. You know where you had him Monday. Where did you have him on Wednesday of that week, now?
A. I can't tell you just where.
Q. Where did you have him on Thursday; did you take him over to Lear's?
A. Don't remember whether I did or not.
Q. Did you take him over to Lear's on Friday?
A. I can't say.
Q. Did you take him over to Lear's on Saturday of that week, or don't you remember?
A. I don't remember.
Q. What day was he sick?
A. He was taken sick on Wednesday.
Q. Wednesday of what week?
A. Wednesday after that.

Q. You mean he came there Saturday and was taken sick a week from the next Wednesday?
A. Yes, sir.
Q. Do you know where you had him on Saturday week from the day he landed?
A. No; I can't tell.
Q. Do you know where you had him on Sunday?
A. No; I don't remember.
Q. Do you know where you had him on Monday?
A. Up the river.
Q. Whereabouts?
A. Three miles up the bay.
Q. Touch shore anywhere?
192 A. Yes, sir.
Q. What place?
A. Well's Island.
Q. Anybody else with you?
A. No, sir; we were alone.
Q. Did he go ashore?
A. Yes, sir.
Q. Have any lunch?
A. He brought some from the Crossman House.
Q. Did you both sit down and eat together?
A. Mr. Davy didn't eat any that day.
Q. Did you eat any?
A. Yes, sir; I had cold lunch.
Q. What he furnished?
A. Yes, sir.
Q. What time did you and — return to the Crossman House?
A. We came in about 5 o'clock, I think; came in a little earlier than usual.
Q. Did he go on up to the hotel?
A. Yes, sir.
Q. Where did you have him on the next Tuesday?
A. Didn't go out on Tuesday.
Q. Did you see him on Tuesday?
A. Yes; I saw him in the afternoon.
Q. Where was he?
A. On the front piazza.
Q. Did you speak to him?
A. Yes, sir.
Q. Did he speak to you?
193 A. Yes, sir.
Q. What did you talk about?
A. I don't remember; we talked awhile.
Q. Can you remember anything that was said?
A. No, sir.
Q. Did he tell you why it was he didn't go out on the river that day?
A. He was not feeling very well.
Q. Did he tell you that?

A. I know that was the reason he didn't go out.
Q. He looked sick, didn't he?
A. He didn't look very well.
Q. Then you went away and left him; now did you see him Wednesday morning?
A. Yes, sir.
Q. What time?
A. I think it was about 9 o'clock.
Q. Where was he?
A. He was up in his room.
Q. You came upstairs to see him?
A. Yes, sir.
Q. How came you to go to his room?
A. Dr. Watson sent me.
Q. Was he up and dressed?
A. No, sir; he was in bed.
Q. Undressed?
A. Yes, sir.
Q. Dr. Watson came down after you?
A. Yes, sir.
194 Q. Where did he find you?
A. Down at the dock.
Q. About what time do you say that was?
A. About 9 o'clock, I think; I am not certain.
Q. Did you go upstairs with the Doctor?
A. No, sir; I went up myself.
Q. He came down and after talking with him you went up to Mr. Davy's room?
A. Yes, sir.
Q. Did you enter the room?
A. Yes, sir.
Q. Did you talk with Mr. Davy?
A. He was not in shape to talk.
Q. Did you talk with him?
A. No, sir.
Q. And he didn't talk to you?
A. No, sir.
Q. You didn't try to talk to him when you saw how he was?
A. No, sir; I did not.
Q. And he didn't make any effort to speak to you?
A. No, sir.
Q. How long did you stay?
A. About a minute or a little over.
Q. Where did you go then?
A. Back down-stairs.
Q. Where else?
A. I came down and told Dr. Watson I couldn't stay in the room.
Q. Where did you go?
A. I told you I came down-stairs and saw Dr. Watson.
195 Q. Where was Watson?
A. He was down-stairs.

Q. Whereabouts was he?
A. Somewhere around there; I don't remember where.
Q. Was he in the hotel?
A. No, sir.
Q. Was he in the yard?
A. I don't remember.
Q. Was he on the dock?
A. No; he was not on the dock. I went and told him I could not stay there.
Q. Where was he when you saw him?
A. I can't remember just where.
Q. Was he on land or water?
A. He was on land; that is certain.
Q. How do you know he was on land if you don't know where he was?
A. I know he was.
Q. After talking with the doctor where did you go?
A. I don't remember just where I went.
Q. Where did you go next after talking with the doctor—that you do remember?
A. Somewhere around the hotel or dock. I don't remember just where.
Q. Where did you go that you do remember after talking with Dr. Watson?
A. I don't remember any particular place.
Q. From that time till to-day you do not remember any particular place that you have been in?
196 A. Lots of places I have been in.
Q. Name the first place that you went in after talking with Dr. Watson about Mr. Davy, that you can remember. Did you go back to Mr. Davy's room?
A. Not right then; I did not.
Q. Where did you go after talking with the doctor?
A. I went to the hotel.
Q. Who did you talk with there about Mr. Davy? Can you remember anybody that you talked with about Mr. Davy at the hotel office or elsewhere? If so, give us the name or names of the parties.
A. I think I was talking with Charlie Crossman.
Q. Are you sure of that or do you only guess it?
A. I think Charlie spoke to me——
Q. Are you sure?
A. I am pretty sure of it.
Q. Do you know what he said to you?
A. I don't remember just what he said.
Q. Did you then go to Mr. Davy's room?
A. Not right off. I went up after a little while.
Q. How long? How much time passed between the time that you left his room and your going up again?
A. Not over three-quarters of an hour or so.
Q. What floor of the hotel was the room on?
A. Upper story in the mansard.

Q. Do you remember the number of the room?
A. No.
Q. Were the rooms all numbered?
197 A. Yes; I think they were.
Q. Did he have more than one room?
A. Not where he was at this time.
Q. You are sure of that?
A. Yes, sir.
Q. Was the elevator in the hotel?
A. Yes, sir.
Q. Did you go up on the elevator?
A. I don't remember whether I did or not; but I think I went upstairs.
Q. I ask you if you know?
A. I am not certain about that.
Q. Won't you describe the furniture in that room?
A. I couldn't do that.
Q. Do you mean you can't say what articles of furniture were in the room?
A. There was a bed in there, and I think there was a stand.
Q. Anything else?
A. Mr. Davy's trunk was there, I think.
Q. I want you to tell me now what you know was in the room; a bed and a stand you know were there; now, what else are you sure were there?
A. I don't remember just what it was. I know there was a bed there because he was lying on it.
Q. Was there a looking-glass of any kind?
A. I think there was.
Q. Remember there was?
198 A. Generally is in those rooms. I don't remember everything there was in the room.
Q. Will you say that Mr. Davy's trunk or any trunk was in that room?
A. I think there was a trunk there.
Q. Are you sure; yes or no?
A. Yes; I am sure there was a trunk there.
Q. A large trunk or a small one?
A. Not a very large one, I don't think.
Q. Was it covered with canvas cloth or not?
A. I don't remember that particular thing.
Q. Was his name on the trunk, or the initials of his name?
A. I don't remember whether they were or not.
Q. Have you named everything that you can remember that was in the room on that day; yes or no?
A. Couple of bottles there.
Q. Where were they?
A. Sitting there in a corner by the bed.
Q. You didn't see them when they were brought in there, did you?
A. No, sir.

Q. And don't you know how long they had been there?
A. No, sir.
Q. Did you examine them to see whether they contained anything or not?
A. I didn't pick them up. I suppose they were empty.
Q. Did you examine the bottles?
A. No, sir; I did not.
199 Q. Then you don't know, as a matter of fact, whether they were empty or full?
A. No—yes, they were empty.
Q. How do you know they were empty?
A. Because Andrew Duclone picked them up.
Q. Did you see him take them up?
A. Yes, sir.
Q. How near were you? Did you look at them at all?
A. I didn't look at them.
Q. Did you see them as he picked them up so you could tell?
A. Yes; I saw them.
Q. Then you are sure there was nothing in them?
A. Yes, sir.
Q. How long did you stay there?
A. All day.
Q. Up to what hour in the evening?
A. Dusk.
Q. You and Mr. Davy speak at all?
A. Yes, sir.
Q. Who spoke first, you or he?
A. I don't remember now.
Q. What did you talk about?
A. I can't tell you.
Q. Can't tell anything that was spoken of?
A. No, sir.
Q. You left about 8 o'clock, you should think?
A. Just after dark.
Q. Where did you go?
A. I went down to Packer's Island.
200 Q. Who was with Mr. Davy when he went away?
A. Andrew Duclone.
Q. How did he come to be there, do you know?
A. I got him to stay with Mr. Davy.
Q. When did you get him?
A. That same morning.
Q. Then he went up to Mr. Davy's room with you when you first went in?
A. Not the first time; the second time.
Q. Before or after you talked with Dr. Watson?
A. Afterwards.
Q. And he stayed in the room with you all that day up to eight o'clock?
A. Up till I left. When I left I left him there.
Q. When did you see Mr. Davy next after that day?

A. Thursday night.
Q. What hour?
A. Along after dark.
Q. Did you speak to him?
A. Yes, sir.
Q. Who was with him when you first went into the room?
A. No one in the room when I first went in. I met Mrs. Davy just as I went upstairs.
Q. Wasn't that Wednesday evening you met her?
A. No, sir.
Q. You will swear that you did not meet her on Wednesday evening?
A. It was on Thursday.
201 Q. You found Mr. Davy about as you had left him?
A. About the same.
Q. In the same room?
A. No, sir; they had moved him into another room.
Q. In the same story of the building?
A. I am not certain about that, but I think he was on the flat below.
Q. You opened the door and saw Mrs. Davy there?
A. No; I was outside and Mr. Davy heard me speaking, and I went in to see him.
Q. Did you speak to Mrs. Davy outside first?
A. Yes; I met her at the head of the stairs?
Q. When you opened that door and walked in wasn't she seated in a chair at her husband's bed?
A. No, sir; I don't think it.
Q. Will you swear she was not?
A. No, sir; I know she was not. I met her at the head of the stairs, and Mr. Davy heard me talking and called me in.
Q. Was his door open?
A. Yes, sir.
Q. How many rooms did they occupy then?
A. I think two rooms.
Q. What language did he use in calling you in?
A. William White.
Q. Did he say William White or William?
A. I can't say.
Q. When he called you did you go in?
A. Yes, sir.
202 Q. What did he say when you went in?
A. I don't remember just the words he spoke to me.
Q. Can you remember anything he said to you?
A. No; I don't remember?
Q. How long did you stay in the room?
A. Not but a minute or so, because the boat whistled, and I had to go.
Q. What boat were you going on?
A. Packer's boat.
Q. Who was captain of that boat?

A. V. Wright.
Q. Did you see Mr. Davy after that?
A. No, sir.
Q. That was the last time you saw him?
A. Yes, sir.
Q. Talked with you as usual, didn't he?
A. Spoke to me about the same.
Q. Who hired you to row Mr. Davy?
A. He hired me himself.
Q. And who paid you?
A. Mr. Davy.
Q. Any agreement between you and he as to price?
A. No, sir.
Q. When did he pay you?
A. The last day I was with him.
Q. The last night you were with him?
A. Yes, sir.
Q. Mrs. Davy present?
A. No, sir.
203 Q. Where was she?
A. She was not there; not that last night I saw him this wasn't.
Q. The last night you saw him in his room before it was changed?
A. Yes, sir.
Q. You and he were alone when he paid you?
A. Yes; Duclone had gone to dinner.
Q. Who first spoke about settling the account between you?
A. I told Mr. Davy I had got to leave that night, and he paid me.
Q. How much money did he give you?
A. Forty dollars.
Q. Where did he get it?
A. It was in a little watch pocket in his pants that was hanging up side of the house, and I went and got them for him.
Q. He put his hands in his pocket and took out $40?
A. That was what he gave me.
Q. Did he count the money?
A. Just $40; that was all the money he had with him.
Q. He took it out and gave it to you?
A. Yes, sir.
Q. Did he tell you how much there was in it?
A. I think he did.
Q. Did you count it in his presence?
A. Yes, sir.
Q. And you found there was just $40?
A. Yes, sir.
204 Q. How did you come to take that large sum of money? The usual rates are $3 a day for man and boat?
A. Give me time and I will tell you. I owed Mr. Lear ten dol-

lars. He owed me thirty dollars for ten days' work, and I had got some stuff over the river, and I had to give Mr. Lear ten dollars.

Q. What did you mean by telling me he paid you $40 for services?

A. $30 for my services. $10 went to Lear.

Q. He has bought bottles of whisky and made you presents of them, hasn't he?

A. Never bought any to give to me.

Q. He did give you bottles, didn't he?

A. I don't ever remember of his giving me a bottle of whisky.

Q. He has bought brandy, hasn't he, and given to you?

A. Never gave me any that I know of; not by the bottle.

Q. Any liquors that were left over after an expedition in the boat each day you had?

A. No, sir; it was always left in the boat.

Q. Did you produce it the next morning?

A. It was always there for Mr. Davy when he wanted it.

Q. Whatever he left at night you had carefully preserved in the morning?

A. Yes, sir.

Q. When did you first receive notice that you were expected to come to Watertown and give your testimony here in this case this time—about how long ago?

A. About a week ago.

Q. What was the manner of the notice? How were you notified? Somebody informed you personally or by letter or by
205 telegraph?

A. Personally.

Q. Who was it came and notified you?

A. Mr. Lawyer.

Q. What is his first name?

A. Lute Lawyer.

Q. Where does he live?

A. Here at Watertown.

Q. Do you know whether or not he is an officer or agent of the Ætna Insurance Company?

A. I do not.

Q. How much money did he give you?

A. He has not given me any.

Q. How much did he agree to give you?

A. Three dollars a day.

Q. And what about expenses in addition?

A. Have to pay our expenses, I suppose.

Q. Give you a railroad ticket up here to Watertown?

A. That is the way we came.

Q. Did he give you a railroad ticket to Watertown?

A. Yes, sir.

Q. Did he agree to pay your expenses during your stay in Watertown?

A. Yes, sir.

Q. Did he agree to pay your expenses back by rail to your home?

A. There was nothing said about that.
Q. Did he have any conversation with you about what the character of your testimony should be?
206 A. No; I don't think he did.
Q. You don't think he spoke to you about it at all?
A. No, sir.
Q. When you came here you met Mr. Strong?
A. Yes, sir.
Q. You were in his room last night at the Woodruff House talking this matter over?
A. No, sir.
Q. Didn't you go to his room last night?
A. No, sir.
Q. Didn't you go to the Woodruff House last night?
A. No, sir.
Q. Was he over to the Globe?
A. He was this morning a little while.
Q. Did anybody take this testimony book or one like this and read aloud to you and the other witnesses last night, yesterday afternoon, or this morning?
A. Mr. Gibson and me looked that over this morning.
Q. Did anybody read it over to you aloud?
A. Mr. Gibson read it to me this morning.
Q. How long?
A. Probably fifteen minutes.
Q. Anybody else read to you from it?
A. Yes, sir.
Q. Who else?
A. Mr. Strong read some of it to me.
Q. Read some of your testimony?
A. Yes, sir.
Q. Before the circuit court at Trenton?
A. Yes, sir.
207 Q. Who else?
A. Nobody else.
Q. How long did Mr. Strong read it to you?
A. Part of it over once; didn't read the whole of it.
Q. Have you told all that you know about Mr. Davy during these ten days?
A. If you want me to answer the question I will tell you.
Q. Yes or no. Have you told me now upon this cross-examination all that you know about Mr. Davy during that last visit of his to the Thousand Islands? Yes or no.
A. I have told all I know of him.
Q. How many summers did you row Mr. Davy when his wife was there and when his wife went out with him?
A. I remember one summer she was there.
Q. Do you remember more than one?
A. I think she was there more than one, but I am not certain.
Q. You knew that you could not be compelled to come from Canada over onto the American side to testify in this case?

A. I don't suppose I could be obliged to.

Q. Don't you understand and have not you always understood that the courts of this State could not compel a resident of Canada to come over here and testify?

A. No; they couldn't do it, but they could come over there. It is all the same thing.

Q. You know all these other witnesses that are here, sitting in the other room and about here.

A. Yes, sir.

Q. You are personally acquainted with all of them?

208 A. Yes, sir.

Q. Can you name any person that saw that pistol that you have spoken of here in Mr. Davy's hands when you say you found him asleep in the orchard?

A. Two.

Q. What two?

A. Mr. Senecal and Mr. Gibson.

Q. They are both here?

A. Yes, sir.

Q. You never told that story about the pistol before, did you, as a witness in this case?

A. No, sir; I never did.

Q. Why didn't you?

A. There isn't everything a man can think of.

Q. Who is the first person whom you first told this story to—that you found Mr. Davy in Senecal's orchard with a pistol in his hands?

A. I told Mr. Strong.

Q. You told him the first one?

A. I don't know as he was the first one.

Q. I want the first one you told it to. Did you ever tell that to any of your brother oarsmen on the river? And, if so, name them.

A. Only those that were with me.

Q. Who were with you?

A. Senecal and Gibson.

Q. You told it to them?

209 A. They were with me.

Q. Then they knew as much about it as you did?

A. Yes, sir.

Q. Who, aside from these two men, did you tell it to?

A. I don't remember.

Q. Can you name any person, except Senecal and Gibson, that you ever told this story to until you told it to Mr. Strong?

A. Not that I know of.

Q. When did you first tell it to him?

A. I told him here.

Q. Here at Watertown?

A. Yes, sir.

Q. Last night or this morning?

A. This morning.

Q. Why didn't you tell it to him before?

A. I didn't think of it; that was the reason.

Q. Never thought of it?
A. No, sir.
Q. Won't you describe that pistol that you saw in Mr. Davy's hands?
A. I can't tell you what kind of a pistol it was; it was what he used always to carry with him.
Q. Describe the pistol if you can.
A. It was just a common revolver.
Q. Can you give any other or better description of it?
A. No, sir.
Q. Was the handle black or white?
A. I am not sure whether it was black or white.
210 Q. Was the iron part of it nickel-plated or not?
A. I am not sure about that.
Q. Was it a self-cocker or an old-fashioned revolver?
A. I think it was a self-cocker; it was a pistol I have shot a number of times myself; used to shoot at marks.
Q. What was its caliber?
A. I don't know. I don't think it was anything else than a common revolver; it was a good one and would shoot a good ways.
Q. And you can't give any other or better or different description of it?
No, sir; I can't.
Q. When you roused Mr. Davy what became of the pistol? Did he put it in his pocket?
A. He did, I think.
Q. I don't want what you think.
A. I am not certain whether he did or not.
Q. You don't know what became of the pistol?
A. He had it all right enough afterwards.
Q. Did you take it into your hand?
A. No, sir.
Q. Did either of the other men take it?
A. No, sir.
Q. Can you now recall that he did put it into his own pocket?
A. No; I do not remember.
Q. What did he say when you aroused him?
A. I don't recollect what he said.
Q. Did he say anything?
211 A. I don't remember.
Q. How did his weight compare with his weight the season before?
A. There was not much difference, I don't think.
Q. How did his weight compare with two seasons before in July?
A. I can't tell; I couldn't see as there was an awful sight of difference.
Q. He always seemed to be about the same weight every time you saw him?
A. He looked bigger this last time in the face.
Q. Describe him generally; whether he was a large or small man; broad-shouldered or slender.

A. He was not a very heavy-shouldered man.
Q. Walk straight or stoop over?
A. Walk pretty straight, I think.
Q. He never complained to you, as I understand it, that he thought anything was the matter with his lungs?
A. Never said anything to me that I remember of.
Q. Did you ever ask him anything about his lungs, whether he had any lung difficulty?
A. No, sir.
Q. Were you ever present when Mr. Davy was consulting with a physician about his condition?
A. No, sir; I was not.
Q. What was the general appearance of his face? Was it of a pallid color or fresher?
212 A. Pretty fresh-looking.
Q. I mean when he came that Saturday on the boat.
A. His face was red-looking.
Q. Red-looking and not pallid?
A. No, sir.
Q. How did it compare with the appearance it presented a year before at that season—the last days of July?
A. I didn't see much difference with it, only it looked bigger. It seemed to look as though it was swelled.
Q. Were you ever present when Mr. Davy bought any liquor of any kind?
A. Yes, sir.
Q. Now, except at Senecal's and at Lear's, where did he ever buy any liquor that you know of—in a bottle, I mean?
A. I think——
Q. Aside from Senecal's and Lear's, did Mr. Davy ever buy any liquor in a bottle that you know of?
A. At the Crossman House.
Q. Did you see him buy it at the Crossman House in a bottle?
A. Yes, sir.
Q. When was that?
A. The year I was with him; the last year.
Q. What day?
A. I don't remember what day.
Q. What time of day was it that he bought anything there in a bottle?
A. In the morning.
Q. What did he buy?
A. I don't know exactly.
Q. You don't know what he bought?
213 A. Not what was in the bottle.
Q. And that is true as to every day, isn't it?
A. Every day he had that bottle with him.
Q. The fact that you don't know what he had in the bottle is true of every day, isn't it; yes or no?
A. No, I don't know what he had in this bottle every day.

Q. When his wife was along on the previous season what did they have to drink in the boat?

A. I always rowed Mrs. Davey herself, and he had other men row him.

Q. Did they never ride in the same boat?

A. They have rowed out together.

Q. What did they have then; did they always have soft drinks then?

A. I don't know.

Q. Didn't you swear on a previous occasion before the circuit court at Trenton that when Mrs. Davy was with her husband in your boat that they always had soft drinks?

A. I didn't swear that Mrs. Davy was with him in the boat; I always rowed her by herself.

Q. Didn't you so testify before the circuit court?

A. No, sir; I don't think so.

Q. Will you swear you didn't say so? Yes or no.

A. I don't know whether I did or not.

Q. If you did say so it was true, wasn't it?

A. Yes, if I swore to it there it must have been true or I wouldn't have sworn to it, but I don't think it is in that way, though.

214 Q. You and Senecal and Gibson live here together?

A. Senecal lives about three miles——

Q. You live within a few miles of each other in the same neighborhood?

A. Yes, we did at that time.

Q. And how many times have you, Senecal, and Gibson talked this matter of the pistol over?

A. Only once that I know of.

Q. Was that here at Watertown with Mr. Strong, or before you started?

A. I don't know whether it was here or not.

Q. Don't you remember such an important matter as that?

A. I think we talked it over at home.

Q. And also talked it over here?

A. Yes, sir.

Q. Did you compare notes to see whether or not you all agreed about it?

A. We couldn't help agreeing about it. The whole three of us were there.

Q. What day of the week was this?

A. I don't know.

Q. What day of the week did he die?

A. On Saturday.

Q. All you know about that is what somebody told you?

A. No, I was not there.

Q. You were not there when his remains were taken away?

A. No, sir.

Q. How many people would your boat hold and did it hold usually?

215 A. About three.

Q. Besides the oarsman?
A. Yes, sir.
Q. When you were rowing on the river and liquor was in the boat you always had some of it?
A. No; not always.
Q. Generally?
A. No, sir.
Q. Did Mr. Davy share any liquor with you that was in the boat at any time during those days?
A. Yes; I have drank with him.
Q. Did you those last days that he was there in 1881?
A. Yes; I have drank some with him.
Q. How many times did you drink with him in the boat?
A. I can't remember all the drinks I took with him.
Q. Can't remember because so numerous; is that the reason?
A. No, sir.
Q. Did you get drunk at Lear's?
A. No, sir.
Q. Didn't you get under the influence of liquor at Lear's at all?
A. No, sir; not when I was with Mr. Davy, I never did.
Q. When Mr. Davy went to lie down in this annex did you get drunk; yes or no?
A. No.
Q. You would drink while he was lying down?
A. I don't remember of drinking at all while he was lying down.
216 Q. How long had Mr. Davy been out of your sight when you found him with this revolver in his hand?
A. Not a great while.
Q. How long was it?
A. I can't tell exactly what time it was; might have been half an hour or so.
Q. Is it your best judgment that he was gone half an hour when you found him with the pistol?
A. Yes, sir.
Q. That is your best judgment?
A. Yes, sir.
Q. Was he asleep?
A. His eyes was shut.
Q. What time of day was it?
A. It was after dinner.
Q. What hour of the clock?
A. We had dinner at 12 o'clock, generally.
Q. What hour of the day was it by the clock that you found him in the orchard with the pistol?
A. I don't remember; somewhere in the afternoon.
Q. Did you all three go together and find him at the same time?
A. Yes, sir.
Q. So that you all saw him at the same time?
A. Yes, sir.
Q. All moved on him together at the same time?

A. Yes, sir.
Q. What was Senecal and Gibson doing there?
A. We missed him, and we all went out to look for him.
217 Q. He had been treating the whole party before he laid down, hadn't he?
A. I don't remember.
Q. He treated you, didn't he?
A. I don't remember.
Q. Treat Gibson?
A. I don't remember.
Q. Treat Senecal?
A. I don't remember.
Q. You have told me all that you know that transpired during those last days?
A. Yes, sir.

Redirect examination by Mr. STRONG:

Q. 15 years from now would bring you back to 1875. Did you know Mr. Davy before 1875? That would be six years before his death.
A. I think I did.
Q. How long before?
A. I don't know how long exactly. I know I have known him a good many years.
Q. Several years before that?
A. I think so.
Q. You rowed him a number of years?
A. Yes. The first year he was there I rowed him.
Q. And you rowed him a good many years?
A. Yes, sir.
Q. How many years did you row him?
A. I think 12 years, anyway.
218 Q. When Mrs. Davy came with him who did you row?
A. I rowed Mrs. Davy.
Q. How many years, according to your best recollection, was she there?
A. I think two or three seasons; might have been more. I don't remember exactly.
Q. When Mr. Davy was out in the boat with you alone did you ever know him to take any soft drink with him?
A. No; I never did.
Q. You have been asked particularly by counsel for the plaintiff what took place on each one of these separate days, separately. Are you able to tell what took place on any one day, as distinguished from any other day, except after he was taken sick or except after Monday, or is it all a general recollection as to what took place when he was there? Do you understand me?
A. No.
Q. Can you tell me what took place on any one day of the week when you were rowing him, separate from what took place on the

other days, or is it a general recollection that you have that covers the whole time?

A. It is about the same thing, I think.

Q. You mean it covers the whole time?

A. Yes, sir.

Q. Can you tell whether you went, for instance, on a Monday to Senecal's or to Lear's?

A. I think we were to Senecal's on Monday.

Q. Can you tell which particular day you were at Lear's during the week?

219 A. No.

Q. One day you would go where?

A. One day down to Senecal's.

Q. And next day where?

A. Next day to Lear's, and the other days we would take lunch and cook dinner on the islands.

Q. One day you would go to one place and another day to another place?

A. Yes, sir.

Q. But which day you went to one and which day to another you cannot tell?

A. No, sir.

Q. When he went to sleep over there at Senecal's you say he went to sleep in an annex? Over to Lear's, I mean.

A. That was in his cottage.

Q. In what counsel called the "annex"?

A. Yes, sir.

Q. What was his condition when he got there—Davy's condition—as to being intoxicated?

A. He was intoxicated.

Q. Did that have anything to do with his going to sleep?

A. I think it did.

Q. You stated you went over to the cottage to look after him?

A. Yes, sir.

Q. Why did you go over to look after him?

A. Because I thought it was not safe to leave him alone.

Q. Why didn't you think it was safe to leave him alone?

A. Because he was the worse for liquor, and I didn't want

220 to leave him.

Q. Did you pay any particular attention to what kind of clothes he had on while he was there or what kind of hat or whether he carried an umbrella or not?

A. No; I never did.

Q. Did you pay any attention to the furniture in the room?

A. I didn't pay any attention. I knew there was a bed there.

Q. But did you pay any attention so it made any impression on your mind?

A. No, sir.

Q. Counsel asked you about your drinking with Davy. Did you drink with him? How often did you drink with him on any particular day?

A. I don't remember; not often.

Q. Did you drink to any such extent as to become intoxicated yourself?

A. No, sir; I never did.

Q. Was there any day there when he was there in 1881 when he had an attack in the boat of any kind?

A. I don't think so.

Q. Wasn't there some day that he would vomit in the boat?

A. No day that he vomited in the boat with me, as I remember. He wasn't with me at that time.

Q. Did you ever know Davy to drink a milk punch?

A. I never did.

Recross-examination:

Q. How long did it take you to row your ordinary gait and motion from the Crossman House dock to Lear's?

A. I generally go it in about an hour.

221 Q. When you left the Crossman House dock on the occasion of the last visit to Lear's Mr. Davy was in about his usual condition in the morning, wasn't he?

A. Yes; about the same.

Q. You and he talked and visited across there to the Lear place?

A. Yes, sir.

Q. How long had he been at Lear's before he went over to this annex or cottage and laid down?

A. Didn't stay only a little while.

Q. How long?

A. Fifteen or twenty minutes; maybe longer.

Q. How do you account for his being sober when he left an hour and fifteen minutes before and being so drunk that you didn't think it was safe to leave him alone?

A. I didn't say he was sober.

Q. You say he was so he could talk and visit with you. Do you mean to say that he was drunk or sober when he left the Crossman House dock?

A. He was not drunk when we started.

Q. Do you mean to say that he was drunk when you landed him at Lear's?

A. Not when we first went in.

Q. And in fifteen or twenty minutes he went over and laid down?

A. It might be longer than that. I can't tell exactly.

Q. I want your best judgment.

A. It might be longer. I can't tell exactly.

222 Q. Do you think it was half an hour?

A. I can't tell just how long.

Q. It might have been six weeks?

A. I can't tell you.

Q. Do you think it was six weeks or twenty minutes?

A. May have been fifteen or twenty minutes or longer.

Q. And after awhile you went over and looked at him?

A. Yes, sir.

Q. Have you given all the reasons now why you had a fear of leaving him alone?
A. All that I know of.
Q. In which hand did he have this revolver when you saw him in Senecal's orchard?
A. In his right hand.
Q. Was his hat on his head or over his face?
A. No; I don't think it was over his face.
Q. Lying on his back or side?
A. On his back, I think.
Q. Flat on his back?
A. I don't remember exactly.
Q. And his hat was on the crown of his head?
A. I don't remember exactly about that.
Q. Where was his left hand?
A. I don't remember.
Q. Did he have his coat on or was he in his shirt sleeves?
A. Had his coat on, I think.
Q. Was that a white or black coat?
223 A. I don't know.
Q. Was the hat a white or black hat?
A. I couldn't tell you.
Q. Was the hat a soft hat or was it commonly called a derby hat?
A. I think he wore a soft hat.
Q. Was this hat that he had on this day a soft slouch hat or a derby hat?
A. I don't remember.
Q. Have you received pay for coming here yet?
A. No, sir.
Q. How much do you expect to receive entire for coming here and giving this testimony?
A. I expect to get three dollars a day as long as I stay here.
Q. And car fare here and back?
A. I don't know how it will be going back.

Deposition of William H. Hunt, taken, pursuant to stipulation, before Honorable C. H. Waltz, at Watertown, N. Y.

WILLIAM H. HUNT, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. STRONG:

Q. Where do you live?
A. La Rue Island—Hill Island is the correct name on the map.
Q. Where is that?
A. River St. Lawrence.
Q. Canada side?
224 A. Yes; just opposite the township of Landsdowne.
Q. Did you know William A. Davy?
A. I knew a man called by that name; yes, sir.

Q. Where did you see him? Did you see him in 1881, the year he died?
A. Yes, sir.
Q. At what place?
A. Crossman House.
Q. Where did you see him principally?
A. I saw him in the yard between the river and the hotel, and I saw him in the hotel.
Q. What place in the hotel?
A. Office and bar-room.
Q. What time of the day did you see him?
A. Morning and evening; wasn't there much during the middle of the day.
Q. Did you see him drink at the bar?
A. Yes, sir.
Q. What did you see him do at the bar?
A. Saw him drink.
Q. How often during an evening?
A. I should judge from four to six times.
Q. Did you ever see him in the morning?
A. Yes, sir.
Q. Where?
A. At the Crossman House.
Q. What room, if any?
A. In the office and bar-room.
225 Q. Did you see him at the bar?
A. Yes, sir.
Q. What was he doing at the bar?
A. I saw him at the bar drinking.
Q. Describe what he did when he took a drink.
A. I saw him go up to the bar and call for his drink and take it.
Q. What did he do?
A. Call for liquor, at least I suppose it was, and pour it out of a bottle and drink it.

Mr. BULGER: I object to what he supposed and ask to have it excluded from the record.
Mr. STRONG: I don't ask that the supposition be considered as evidence.

—. How often did you see him there at the bar drinking?
A. A number of times.
Q. Can you remember any one morning separate from another morning?
A. No; not exactly, for I didn't pay any attention to it.
Q. Can you tell what took place on any one morning as distinguished from another morning?
A. No, sir.
Q. Were you in his room after he was taken sick?
A. I was once.
Q. Describe his condition.
A. I was in his room, I think, on Friday evening and he seemed

to be very wild and nervous; his nerves seemed to be all un-
226 strung; seemed to be some object in front of him, and he didn't notice me when I went to the door. I didn't go no further than the door.

Q. What was he doing with his hands?

A. Seemed as if there was something he wanted to get hold of; his nerves seemed to be all working.

Q. How were his eyes?

A. Very glassy; set on some object.

Q. Was there anything in front of him?

A. Nothing that I could see; no, sir.

Q. How long did you stay there?

A. Only a minute or so; I went to the door only.

Q. Where was he?

A. In bed.

Q. How about his legs—as to moving them?

A. Seemed to have the use of them—drawing them up and straightening them.

Q. As to his general condition at that time with regard to his actions, state.

A. As I told you, it seemed as if there was something he wanted to get hold of.

Q. As to his being nervous and excitable?

A. He seemed to be nervous; at least that was what I supposed he was.

Q. You saw what his condition was?

A. Yes, sir.

227 Q. I want you to describe what you saw; not what you guessed or supposed, but what you saw; what his condition was as to nervousness and excitability as you observed it?

A. He seemed to be very nervous, and it seemed as if there was some object in front of him, that I couldn't see, that he wanted to get hold of that was annoying him.

Q. Was there any object there?

A. No, sir; nothing I could see.

Q. How long did you stay in there?

A. Couldn't have been more than a minute or two, maybe three.

Q. Why didn't you stay in there longer?

A. Because I didn't like his actions.

Q. What were his actions?

A. Very wild, raving like a man out of his head.

Q. After Mr. Davy died were you in the room?

A. Yes, sir.

Q. What had you to do about Mr. Davy then?

A. After I came from dinner on Saturday Mr. Crossman met me at the entrance as you go into the hotel office.

Q. After you had a talk with Mr. Crossman what did you do?

A. I went to Haydon's Island and got Mr. Harrison Cornall, the undertaker of Alexandria Bay, to come up and lay him out.

Q. What time of day was this?

A. Right after dinner.

Q. Had you seen Mr. Davy then?
A. No; not that day.
Q. Did you get Mr. Cornall?
A. Yes; I rowed him up.
Q. Then did you go into Mr. Davy's room?
228 A. Yes; he asked me to assist in washing and laying him out, and I did so.
Q. Who asked you?
A. Mr. Crossman.
Q. You were in the room?
A. Yes, sir.
Q. Was there any embalming done?
A. That was done in the evening after he had been first laid out.
Q. Were you there when he was embalmed?
A. Yes, sir.
Q. How was that done?
A. The undertaker from Clayton did it; he injected stuff into his stomach; an acid of some kind—I don't know what it was—into his stomach and nostrils and ears.
Q. Did you notice anything in regard to intoxicating liquors while you were there?
A. We found a bottle or two under the bed when laying him out.
Q. Were they full or empty?
A. There was a little in one bottle, I think.
Q. When they made the insertion for the purpose of injecting the acid into his stomach what took place?
A. There was a very offensive smell when the acid was injected into his stomach.
Q. Can you describe that smell?
A. I don't know as I can describe it like one of you gentlemen, but I can in my own way. I took it to be the smell of dead
229 liquor; of course, I don't know whether I am right or not, but that is what it seemed to me; it was a very offensive smell and quite hard to stand—had to have the windows up to do it.
Q. Did you do anything with reference to Mr. Davy while you were there besides this?
A. Yes; helped to move him after he was embalmed and take him to the cottage.
Q. When you got him to the cottage did you do anything further with him?
A. Sat up all night with him.
Q. Anything else?
A. Yes; there was ice cans around his body that had to have ice kept in them.
Q. Tell us what you did after that.
A. Mrs. Davy came to the door after we had got him taken to the cottage and gave me orders not to allow any of the Crossman family in to see him because they had used her so mean in having him

shifted. Mrs. Crossman came very early next morning and wanted to see Mr. Davy, and I wouldn't let her.

Q. Did you go anywhere on Sunday?

A. Yes; helped carry the corpse to Cornwall's dock and put him on board of the R. P. Flower and put him on board cars.

Q. Was anybody with you then?

A. Yes, sir.

Q. Who?

A. Mr. James A. Root, that sat up and helped to embalm and carry him to the dock.

230 Q. Did you see Mr. Davy at other times than in the bar-room at Alexandria Bay?

A. I have seen him in the yard—that is, down on the dock there is a yard with willow trees set up around there.

Q. Describe, if you please, his condition as it appeared to you to be with reference to being under the influence of intoxicating liquors whenever you saw him.

A. This was around the hotel that I saw him.

Q. How did he appear to you to be with regard to being under the influence of intoxicating liquor whenever you saw him? Was he or was he not?

A. Yes, sir.

Q. You mean that he was under the influence?

A. Yes, sir.

Cross-examination by Mr. BULGER:

Q. When did you first see Mr. Davy, in 1881, at the Crossman House or in that vicinity?

A. I think it was on Monday evening.

Q. Was it in July or August?

A. I don't know what day of the month it was nor what month.

Q. Who was with you when you first saw him there?

A. I don't remember. There was always a crowd of boatmen around there and guests.

Q. Where was he when you first saw him?

A. Saw him in the bar-room.

Q. Had you known him before?

A. By name.

231 Q. Had you ever spoken to him before?

A. Never had any conversation with him; *A.* No, sir.

Q. You had never rowed him?

A. No, sir.

Q. He had never employed you to do anything?

A. No, sir.

Q. Nobody introduced you to him?

A. No, sir.

Q. Did you speak to him that night?

A. No, sir.

Q. You think that was Monday night?

A. I think Monday evening.

Q. About what time Monday evening?
A. I should judge it was in the neighborhood of 8 o'clock.
Q. Are you related to the last witness?
A. No, sir.
Q. Live near him?
A. Within about 7 miles of him.
Q. Are you a married man?
A. Yes, sir.
Q. At what place do you live?
A. On La Rue Island.
Q. What family have you as to wife and children?
A. Wife and three children.
Q. And your occupation in the summer time is that of an oarsman on the river?
232 A. Yes, sir; at the time it was. I follow sailing and farming now.
Q. Do you own any property in real estate?
A. Yes, sir.
Q. In Canada?
A. Yes, sir.
Q. Have you testified before in this action?
A. Yes, sir.
Q. How many times?
A. Once.
Q. You were sworn at the trial at Trenton?
A. Yes, sir.
Q. How did you know that night that was Mr. Davy you saw, never having spoken to him?
A. By hearing his name called.
Q. Who called his name that night?
A. I had known him from seeing him——
Q. No; how did you know him by hearing his name called; was it called that night?
A. No, sir; not that night.
Q. How long was it before?
A. I can't tell you.
Q. Was it that same year?
A. I had heard it a number of years.
Q. How long before this night was it that you heard his name called; how many days before?
A. I think it was on Monday evening that I saw him with Mr. White.
Q. You recognized him, did you, as being Mr. Davy?
233 A. Yes, sir.
Q. What did you go to the bar-room for?
A. I was going through—going to the office.
Q. Were you employed in the Crossman House?
A. No, sir; I was a boatman there.
Q. Do you remember what purpose took you in there on this particular occasion?
A. No, sir; I don't.

Q. Do you remember the name of any person whom you saw there in the bar-room except Mr. Davy when you went in there that night?
A. I saw the bartender there.
Q. What is his name?
A. I think his name is Saxe; of course I only know by hearsay.
Q. I want you to name somebody you know that you saw there, if there was anybody.
A. That is the only one I remember seeing in the bar, is the bartender.
Q. You did not see Mr. William White there on this occasion, did you?
A. No; I don't remember.
Q. This was about what hour of the evening?
A. I should judge between 7 and 8 o'clock.
Q. It was after dark, was it; lights burning in the bar-room?
A. Summer time, as a general thing, it is not dark at seven.
Q. How was it—light or dark?
A. I don't remember.
Q. Was he standing up to the bar?
A. He walked up just as I came in.
234 Q. How many persons were in the room when you went in?
A. I don't remember seeing only Mr. Davy and the bartender.
Q. How long were you in the bar-room just while you were passing through?
A. I walked through. I didn't stay in any time.
Q. Did you stop any length of time?
A. I might have been there a minute or half a minute.
Q. Have you any recollection whether you were there a minute or not?
A. No, sir.
Q. Do you know where you were going to when you passed through the office?
A. I went into the office and out again to see if any of the boys were there.
Q. Do you know what boys you were looking for?
A. No, sir.
Q. You were looking for some of the boys, but you don't know which one, and went out from the office where?
A. Onto the piazza.
Q. Where did you go then?
A. I can't tell you.
Q. Can you name any person that you saw upon the piazza that you know?
A. I cannot.
Q. When you left the piazza where did you go?
A. I don't know.
Q. Did you go to the river?
A. I don't know.
Q. Did you come back to the hotel that night again?
235 A. I cannot tell.

Q. Did you see Mr. Davy again that night?
A. I can't tell.
Q. How long was this in number of days before he died?
A. I think it was on Monday same week or Monday before; I am not exactly sure which.
Q. As you walked into the bar-room you saw him walking up to the bar?
A. Yes; he stepped up to the bar.
Q. How was he dressed—in light or dark colored clothes?
A. I don't know. I never pay no attention to people's clothes.
Q. What kind of hat did he wear?
A. I don't know.
Q. Soft hat or Derby hat or high hat?
A. I have already answered you, my friend, that I don't know.
Q. What was the color of his hat?
A. I don't know whether it was white or black.
Q. Did he have a cane in his hand?
A. I don't know that.
Q. Did he have an umbrella in his hand?
A. I don't know.
Q. Did he have an overcoat on?
A. I don't know; don't think he did.
Q. Describe his face as you saw it as to whether he had a mustache and whiskers.
A. Yes, sir; he had mustache and whiskers.
Q. What portion of his whiskers were growing?
A. Something like mine—full beard.
236 Q. What color whiskers?
A. Dark, sandy whiskers.
Q. Do you remember the color of his hair?
A. Dark, brownish color.
Q. About how tall a man was he?
A. I should judge he was a man that would stand about five feet eight or nine.
Q. About what was his weight?
A. I should take him for a man that would weigh in the neighborhood of 140 or 150 pounds.
Q. What was his age, would you say?
A. He looked to me somewhere from 30—35 or 40.
Q. You had not seen him before that since the season previous?
A. Not before that Monday.
Q. When did you next see him after that Monday?
A. I saw him, I think, on Tuesday evening, and I didn't see him again until Friday evening.
Q. Where was he on Tuesday evening?
A. I saw him when he came in, I think, from the river. I saw him in the bar-room and office.
Q. That was the first place you saw him on Tuesday eve.?
A. Yes, sir.
Q. What time in the evening?
A. Between 7 and 8.

Q. How many persons were in the bar-room?
A. I can't tell.
Q. Anybody there besides Mr. Davy?
A. I can't tell you that.
237 Q. You don't remember whether there was 40 or more persons?
A. It is pretty hard to tell.
Q. Can you remember whether there were 40 persons, or no one but Mr. Davy?
A. No; I cannot.
Q. Do you remember at which end of the bar he was?
A. At the end where the show-case with cigars is.
Q. North, south, east, or west?
A. South corner, I should say.
Q. Was he smoking?
A. No, sir.
Q. How was he dressed that night?
A. I can't tell.
Q. Clothes white or black?
A. I don't know.
Q. Do you know anything about his hat?
A. No, sir.
Q. Was it a straw hat?
A. I can't tell you.
Q. Don't you know anything about it?
A. No, sir.
Q. Was he talking with anybody?
A. He called for a drink, and stood there talking with the bartender.
Q. Seemed to be about as he was the previous evening when you saw him?
A. Yes, sir.
Q. Did you go into the bar-room that night?
238 A. Yes, sir.
Q. Did you stop there or did you continue walking through?
A. I might have stopped a minute or so, and I might have walked right on.
Q. What did you do?
A. I don't know what I did.
Q. Do you know where you were going to?
A. Do not.
Q. Do you know whether or not you were looking for anybody?
A. No, sir.
Q. You have no recollection whatever as to what your purpose was in going through the bar-room?
A. No, sir.
Q. Where did you go when you got out of the bar-room?
A. Through the office and out on the piazza.
Q. Can you name any person that you saw in the office or out on the piazza that Tuesday evening?
A. I cannot.

Q. How long did you remain on the piazza?
A. I can't tell you.
Q. Did you remain standing or did you take a seat?
A. I don't know.
Q. When you left the piazza where did you go?
A. Don't know.
Q. How many years had you seen Mr. Davy about the islands before this?
A. I don't know as I ever saw him around the islands; I saw him about the hotels or premises.
239 Q. How many years had you seen him about the hotels there?
A. About two years.
Q. When you went away this Tuesday evening did you return again?
A. No, sir.
Q. You remember seeing Mr. Davy again on that Tuesday evening, during the evening?
A. Yes; I saw him that same evening; saw him going down towards the boat landing.
Q. Where were you down on the landing?
A. I was sitting on a seat right near the boat landing.
Q. That was about what time in the evening?
A. I can't tell you.
Q. At that time did you see Mr. William White, the last witness?
A. I don't remember seeing him.
Q. Did you ever see Mr. Davy during 1881 at any time when you saw Mr. White present; if so, where and when?
A. I saw them once at the bar.
Q. Upon what day of the week was that?
A. To the best of my knowledge it was Tuesday evening.
Q. What makes you think it was Tuesday evening that you saw him with White at the bar; how do you know it was not Thursday or Monday evening?
A. It was either Monday or Tuesday evening; Thursday evening I didn't see him, because I was over to Canada on Thursday evening.
Q. When was your attention first called as to whether you
240 had seen Mr. Davy about the Crossman House in 1881?
A. How do you mean?
Q. When were you asked if you had seen Mr. Davy there?
A. It is over two years ago when I was first spoken to about it.
Q. Up to two years ago no one had spoken of it?
A. Only I heard that the company and Mr. Davy's widow was in a lawsuit.
Q. How do you know that it was on Monday evening that you saw Mr. Davy first in 1881 at that bar and not some other day of the week?
A. I give you my reasons; that I was not there on Thursday evening; that I was over home, and on Friday evening.

Q. How do you know that it was Monday evening you first saw him instead of Saturday or Sunday or some other day?

A. Because I was home on Sunday.

Q. Did you make any memorandum of the day of the week or month?

A. No, sir.

Q. All you know about it is what your memory brings back to you?

A. To the best of my knowledge.

Q. Are you willing to swear positively that it was Monday?

A. Either Monday or Tuesday.

Q. How do you know it was not Saturday or Sunday?

A. I went home on Saturday evening and didn't come back till Sunday night, and I went to the boarding-house, and was not at the hotel.

241 Q. On Tuesday evening the last you saw of Mr. Davy was at the landing?

A. Yes, sir.

Q. How long was he there?

A. I don't remember.

Q. Was he alone?

A. Some one was with him.

Q. Man?

A. Yes, sir.

Q. Did you see this gentleman, A. C. Mattoon, there?

A. No, sir.

Q. Do you know whether or not he was the man who was walking with Mr. Davy when you saw him coming down towards the landing?

A. I am sure he was not the man.

Q. During the season of 1881 did you see this gentleman, Mr. Mattoon, around there at all?

A. He was at the Thousand Island House. Yes, sir.

Q. Will you swear he was not the man that was at that landing that Tuesday evening with Mr. Davy?

A. I will.

Q. Was he in that vicinity at that time?

A. If he was I didn't see him.

Q. Do you know whether or not he was there?

A. I didn't see him if he was.

Q. Could he have been there and you not see him?

A. Yes, sir.

Q. There was a number of people there all the while?

A. Yes; most of the time.

242 Q. Mr. Davy, the last you remember of him, was on that landing?

A. Yes, sir.

Q. When did you next see him after that Tuesday evening, and where?

A. In his room.

Q. Where was that?

A. In the Crossman House.
Q. What floor?
A. I can't tell you. I didn't keep track.
Q. You know where the office is?
A. Yes, sir.
Q. Was it right over the office?
A. Don't think it was.
Q. What is your best recollection now as to where the room was?
A. I don't know. I didn't keep track of the flights of stairs going up.
Q. Was it on the first floor, second, or third?
A. I don't know.
Q. Was it on the upper floor of the building?
A. I can't tell you.
Q. What was the number of his room?
A. I can't tell you.
Q. Who told you where his room was?
A. Mr. Crossman.
Q. Did he give it to you by number?
A. I went up with one of the bell-boys?
Q. Mr. Crossman sent one of the bell-boys up with you?
A. Yes, sir.
243 Q. What time of day was this?
A. Wednesday evening.
Q. What hour?
A. No; it was Friday evening.
Q. Then you had not seen him from Tuesday evening till Friday evening?
A. No, sir.
Q. That was the last time, then, that you ever saw him alive; was this Friday evening?
A. Yes, sir.
Q. And who opened that door—you or the bell-boy?
A. The bell-boy.
Q. Did he go in?
A. No.
Q. Did you go in?
A. Just inside the entrance.
Q. Why didn't you go in?
A. I didn't feel like going in.
Q. Why not?
A. I had no occasion to go in.
Q. Who was there?
A. Dr. Watson was one that was there.
Q. Who else?
A. I don't know.
Q. Did you see a woman there?
A. I did not.
Q. Did you see into both rooms?
A. No, sir.

Q. Which door did you go into—the door that led into the
244 room where the bed was or another?
A. The one that led into where the bed was.
Q. Was there another room that a door opened into?
A. I didn't see any.
Q. What purpose did you have, if any, when you went up; what did you go up for?
A. I heard the talk of his condition, and I wanted to see him.
Q. Can you give any other, different, or better reason for going up there?
A. No, sir.
Q. Then Crossman didn't send you up; you wanted to go up?
A. I asked Crossman for permission to go up.
Q. Where was the bed in that room with respect to the door?
A. The door opened, and the bed was right off from in front of the door.
Q. Directly opposite the door?
A. Not directly opposite, but off from the door.
Q. Left or right of the door as you stood looking into the room?
A. Right-hand side of the room, to the best of my knowledge, as you go in.
Q. You don't know which room the bed was in; you saw but one room?
A. That is all.
Q. What else did you see in the room beside the bed?
A. I didn't notice.
Q. Was his feet towards you or his head as you stood at the door looking in?
245 A. His feet was sideways. The bed was on the right-hand side of the door; not exactly opposite, but to the right of the door as you go in.
Q. Was the side of his body towards you, or his head or his feet?
A. I should judge it was his feet, facing not exactly towards me, but a little that way.
Q. You know what a right angle is. Was the side of this bed towards the door, or its head or its foot?
A. I don't exactly remember now which was towards the door, the head or foot.
Q. You didn't go into the room at all?
A. Not clear into the room; no further than the door.
Q. Won't you describe the foot-board and the head-board of that bed?
A. No, sir; I will not try to describe it.
Q. How far was the foot-board from the door?
A. I won't describe it at all, because I didn't notice it.
Q. What was the color of the wood?
A. I didn't notice it.
Q. Was it oak or was it walnut?
A. I didn't go there to examine the furniture.
Q. What did you go there for, mere curiosity?
A. To see the gentleman.

Q. Mere curiosity?
A. Yes, sir.
Q. You say there was no other person in the room?
A. Dr. Watson, and might have been others.
Q. Did you see others?
A. I don't know that I did or did not.
246 Q. Did you speak to anybody there?
A. No, sir.
Q. You know Dr. Watson?
A. Yes, sir.
Q. Have for a number of years?
A. Yes, sir.
Q. Did you speak to him or he to you?
A. No, sir.
Q. How long did you stay at the door?
A. Not over a minute, I don't think.
Q. Then you went down-stairs?
A. Yes, sir.
Q. You didn't see him alive after that?
A. No, sir.
Q. When did you next see him or hear as to his condition?
A. After dinner I heard of his being dead, on Saturday.
Q. What time by the clock?
A. I can't tell; I had just come from my dinner.
Q. What time did you have dinner that day?
A. Generally had it at 12 o'clock.
Q. What time that day?
A. I can't tell, but that was the rule at the boarding-house where I had my dinner.
Q. I don't care about your rules. Tell me the best judgment you have of the time of day you heard he was dead.
A. I can't tell.
Q. So far as you know it was 4 o'clock in the afternoon?
A. It was not so late in the day.
247 Q. Was it as late as 3 o'clock?
A. No, sir.
Q. Was it as late as two?
A. I don't know.
Q. You have told me all you know about the time of day it was when you heard the news of Mr. Davy's death?
A. Yes; I have, — best of my knowledge.
Q. Who told you that Mr. Davy was dead?
A. Mr. Crossman.
Q. Which one, father or son?
A. The old gentleman.
Q. Do you remember where you were when he told you that—in the hotel or outside?
A. I was right outside the piazza.
Q. Did you ask him or did he tell you that he was dead?
A. He told me that he was dead.

Q. Did you go then immediately to the room where Mr. Davy's body was?

A. No; not until I came back with Mr. Cornwall.

Q. What time was that?

A. I rowed down as fast as I could pull.

Q. What time of day was it that you came back with the undertaker?

A. I should judge about one o'clock when I got back with the undertaker.

Q. How long were you gone for the undertaker?

A. It is only a mile or a mile and a half, and I went right down and back.

Q. Were you gone an hour?

A. No, sir.

248 Q. Three-quarters of an hour?

A. Hardly, I think.

Q. When you got back with the undertaker did you go to the room where Mr. Davy's body was?

A. Yes, sir.

Q. Who did you find there?

A. Not a person, but a number came in while we were there.

Q. When you first went in who was there?

A. No one.

Q. Did you see Mrs. Davy?

A. Not until that night.

Q. Did you see Mr. Frank Davy anywhere?

A. Yes; he came in after I got there with Mr. Cornwall.

Q. Was there any other lady or not there besides Mrs. Davy?

A. I didn't see any.

Q. Did you help to lay out the body?

A. Yes, sir.

Q. You helped Mr. Cronwall do that?

A. Yes, sir; wash him and lay him out.

Q. Wash the body and dress it?

A. Yes, sir.

Q. What clothes did you put on?

A. A dark pair of pants and a white shirt.

Q. Anything else?

A. White pair of stockings or socks.

Q. Put any vest or coat on the body?

A. Don't think we did; no, sir.

Q. Was Mrs. Davy there in the room at all?

A. I have told you I didn't see Mrs. Davy there that afternoon.

249 Q. Did anybody comb Mr. Davy's hair?

A. Mr. Cornwall did that.

Q. You saw that?

A. Yes, sir.

Q. Was Mrs. Davy in the room when that was done?

A. No, sir.

Q. Was Mr. Frank Davy in the room then?

A. I don't think so.

Q. Was anybody in there but you and the undertaker?

A. I don't think there was while we were washing and laying him out; quite confident there was not.

Q. When the body was laid out, to use a common phrase, what did you do—go away and leave the body in the room?

A. We went out and telephoned for the undertaker.

Q. Who telephoned for the undertaker?

A. I think Mr. Davy did. The undertaker came from Clayton.

Q. Do you mean to say there was a telephone at the Crossman House in 1881?

A. I mean telegraph.

Q. Where did they telegraph to?

A. Clayton; at least, that was where the gentleman said he was from that embalmed him.

Q. Then you came back and saw the remains that evening?

A. I came back and helped embalm him.

Q. What did you do by way of helping?

A. I helped loosen his clothes and held the dish that the acid was in?

Q. And you thought he smelled of liquor?

A. That is what I took it to be.

250 Q. Had you ever smelled dead liquor before?

A. I had smelled drunken men's breath.

Mr. BULGER: I ask that the answer be stricken out as not responsive to the question.

COMMISSIONER: The words used by the witness to the effect that he had smelled drunken men's breath may be stricken out because those words are not responsive to the question.

Mr. STRONG: I claim they are responsive and that I am entitled to the answer.

COMMISSIONER: They are not wholly responsive and may be stricken out.

Mr. BULGER: Had you ever smelled dead liquor before?

A. No; only in that way.

Q. Had you ever smelled dead liquor before?

A. Only in the way I told you.

Q. What way was that?

A. In getting drunken men's breath.

Q. How many drunken men's breath have you smelled?

A. I can't say.

Q. When did you last smell a drunken man's breath?

A. I can't tell you that either, exactly.

Q. Do you know the name of any drunken man whose breath you smelled while he was drunk at any time?

A. Yes, sir.

Q. How many such men did you know?

A. One man.

Q. Do you know more than one man whose breath you have smelled while he was drunk?

251 A. That is all I remember of.

Q. How many years ago was that?

A. Not more than three weeks ago. I saved him from being almost drowned.

Q. Did you smell his breath more than once?

A. Yes, sir.

Q. How many times?

A. I can't tell; I have seen him drunk a number of times.

Q. Twenty times?

A. I can't tell.

Q. When you smelled his breath did you know what he got drunk on—whether it was whisky, beer, wine, cider, or what?

A. No, sir.

Q. When you smelled the dead liquor in Mr. Davy's stomach at the time of the embalming, you cannot tell whether it was a beer smell or a whisky smell or what it was?

A. It was similar to that.

Q. You don't know anything about the nature of the gases that form in the human stomach?

A. No, sir.

Q. You don't know anything about the nature of the gases that form in the stomach of a sick man?

A. No, sir; I do not.

Q, Are you quite sure that it was dead liquor that you smelled?

A. That is what I took it to be; that is my idea.

Q. Did you help to carry the body from the room to the cottage?

A. Yes, sir.

Q. Who helped you?

252 A. The undertaker from Clayton and the undertaker at Alexandria Bay and Dr. Watson.

Q. Did Dr. Watson help you carry the body?

A. I can't say as he helped carry. James Root was there.

Q. Was it after dark that you carried the body to the cottage?

A. Yes, sir.

Q. What time in the evening?

A. I can't say.

Q. Your best judgment?

A. Between 8 & 9.

Q. Who put ice about the body in the cottage?

A. I helped to do it and Mr. Root helped to do it.

Q. Was that done immediately after the body was put in the cottage?

A. To the best of my knowledge, before the body was shifted to the cottage.

Q. When were the remains removed to the R. P. Fowler—the steamboat?

A. On Sunday.

Q. What time?

A. In the neighborhood of 11 o'clock.

Q. Who carried the body from the cottage to the wharf where the boat was?

A. Mr. Root and myself, and I don't know who else helped carry.
Q. Were there three of you or four?
A. I don't know; I know I was there and Mr. Root.
Q. Did you go aboard the boat and go up to Clayton?
253 A. Yes, sir.
Q. Who went up to Clayton with you when the body went?
A. Mrs. Davy and Mr. Davy, and I think there was another lady along. I don't remember whether there was one or two ladies with her.
Q. What men went?
A. I think Mr. Mattoon came down to the dock from the Thousand Island House after the corpse was carried down.
Q. Did he go aboard the R. P. Flower?
A. I don't know. He might have been on board in the after cabin and I not see him.
Q. There were no passengers on board that boat at all, were there?
A. No, sir.
Q. As you understood, it was going up for the express purpose of carrying the body and friends of the deceased?
A. Yes, sir.
Q. Did you help put the body aboard the cars?
A. Yes, sir.
Q. Did Mr. Mattoon help?
A. I don't remember seeing him.
Q. What was it that was over the coffin?
A. He was in a casket that the undertaker brought.
Q. What was there on top of the coffin?
A. I don't know as there was anything or not. It was not exactly a coffin. It was made a purpose to carry dead people on the cars.
Q. Was it open or closed?
A. Closed.
254 Q. Was a portion of the cover of glass or was it open, so you could see the deceased person's face as it was carried along?
A. I don't know whether the cover was screwed down or not, but I think it was.
Q. Don't you know that Mr. Mattoon was there and directed the carrying of that body from the cottage to the R. P. Flower and from the R. P. Flower to the car in which you placed it?
A. No, sir.
Q. Will you swear that he did not direct and assist the men in putting the body into the car?
A. I won't swear to that.
Q. Will you swear that he did not assist in placing the body on the car at Clayton?
A. I won't say at Clayton, but I know he did not have anything to do with taking the body from Crossman's cottage to the dock.
Q. Do you remember whether or not any persons met the deceased at Clayton?

A. I don't remember; wouldn't know them to recall them if there was. They would be strangers to me.

Q. Don't recollect anything about that?

A. No. They had a special, and it was Sunday, and I can't say whether their friends met them or not. They might have done so, for what I now.

Q. Who went over to Canada to notify you that you were wanted at Watertown—to be here to-day?

255 A. Mr. Lawyer.

Q. Were you at your home?

A. No, sir.

Q. Where did he find you?

A. At Henry Hunt's, my uncle's.

Q. That is in your neighborhood?

A, On the same island I live on.

Q. What did he agree to give you?

A. Three dollars a day.

Q. Did he give you a railroad ticket?

A. No, sir.

Q. Did he advance you any money—pay your fare up here?

A. He must have paid it; I didn't.

Q. Was you with him when you came up?

A. Yes, sir.

Q. You understand he is the agent of the defendant's company?

A. I don't know.

Q. Didn't he refer to the company as his company when talking with you?

A. No, sir.

Q. You didn't know who he was?

A. Yes; I knew him.

Q. Is he a Watertown man?

A. I understood so always.

Q. Did he tell you that Mr. Strong sent him over there to have you come here and give your testimony before the commissioner to-day?

A. Don't remember whether he said anything about Mr. Strong or not.

256 Q. You were to have $3.00 per day and expenses, were you not?

A. Yes, sir.

Q. Did he suggest to you what you were expected to testify to here to-day or not?

A. No, sir.

Q. Did he talk with you about what you knew about the case?

A. No, sir; he did not.

Q. Did he talk with the others in your presence?

A. No, sir; he did not.

Q. When you went there to help lay that body out, as you say, wasn't the body already clothed in a suit of underclothing?

A. He had on a pair of drawers.

Q. And a wrapper or undershirt?

A. Yes; he had on a white shirt and a light undershirt.
Q. What kind of a shirt did you put on?
A. A white shirt.
Q. Did you take off the drawers and undershirt the body had on?
A. Yes; took them all off and washed the body and changed the clothes and put on pants and drawers.
Q. Have you ever been convicted of any crime any way?
A. No, sir.
Q. Do you get drunk occasionally?
A. No, sir; I do not.
Q. You never drank with Mr. Davy?
A. No, sir.
Q. But you do drink more or less?
A. That is my business.
257 Q. Do you decline to answer?
A. I have told you once.
Q. That is all the answer you will give me?
A. That's all you will get from me about my drinking.

Deposition of John R. Gibson, taken, pursuant to stipulation, before Honorable C. H. Walts, at Watertown, New York.

JOHN R. GIBSON, a witness called on behalf of the defendant, testified as follows:

Direct examination by Mr. STRONG:

Q. Where do you reside?
A. Mallorytown, Ontario, Canada.
Q. Did you ever know William A. Davy?
A. Yes, sir.
Q. When did you first know him?
A. Good many years ago; I can't tell exactly.
Q. Do you remember the year he died?
A. I remember well when he died.
Q. When was it?
A. I wouldn't swear to that justly.
Q. The year of his death, for your information, was 1881; how long before that had you known him?
A. I knew him for somewhere from ten to fifteen years.
Q. What was your business during those years?
A. I was a guide or boatman, as you might call it, on the St. Lawrence river some of the time, and some of the time I was not.
Q. Part of the time what else did you do?
258 A. I was in the hotel business a couple of years.
Q. What hotel did you keep?
A. At Rockport.
Q. What is the name of the hotel?
A. It is called now the Island View House.
Q. Is that the same one occupied by Lear?
A. One he occupies now; he rebuilt it.

Q. What years did you keep there; how many years did you keep it?

A. I think I left that hotel 14 years ago this last fall.

Q. How long had you kept it before then?

A. Two years or a little better.

Q. When you were an oarsman at Alexandria Bay where were your headquarters?

A. Part of the time at the Crossman House and part of the time at the Thousand Island House.

Q. Did you ever row Mr. Davy?

A. I did.

Q. How many years before his death was that?

A. Two or three years; somewhere near there; I can't tell exactly.

Q. Is your memory distinct as to days and dates, in giving your testimony?

A. No, sir.

Q. Can you separate the occurrences of one day from what occurred on another day?

A. No, sir; not to give the dates or names of the day.

Q. Did you row Mr. Davy in 1880?

A. Don't think I did; no, sir.

259 Q. Did you row him one day when his wife was there?

A. I did, for two or three days.

Q. Tell me in your own way when it was and where it was that you rowed Mr. Davy.

A. Mr. White came to me and wanted to know if I could row Mr. Davy for two or three days, until he could take him. He was with some other party.

Q. Did you do that?

A. Yes, sir.

Q. Do you remember which year that was?

A. I wouldn't say. It was some two or three years before Mr. Davy died.

Q. Did you row him one year when Mrs. Dacy was there?

A. I think that was the year Mrs. Davy was there.

Q. Did you see him there in 1881?

A. I did.

Q. That was the year of his death?

A. Yes, sir.

Q. Where did you see him?

A. At the Crossman House.

Q. At what part of the Crossman House?

A. I can't exactly remember. I think I met him on the outside of the house.

Q. Did you see him inside the house?

A. Yes, sir.

Q. Where—what room?

A. I saw him in the office and different parts of the house.

Q. Did you ever see him in the bar-room?

260 A. Yes, sir.

Q. Did you ever see him drink at the bar?
A. Yes; I have seen him drink.
Q. What time of the day was that?
A. In the evening, because that was the only chance I had to see him.
Q. Didn't you see him in the morning?
A. Are you asking me when I rowed him?
Q. I ask you when you saw him drink at the bar.
A. If it was this last year, I think I saw him outside of the house and different places around, and think I saw him in the bar.
Q. Did you see him drink in the bar?
A. I think I did, once; yes, sir.
Q. Any other year? Tell us about his drinking—when and where you saw him drink.
A. I can't tell you any particular year.
Q. Did you see him any year prior to this drinking?
A. Yes; I saw him take drinks.
Q. Where?
A. Different places; saw him drink in the Crossman House and I saw him drink at Mr. Senecal's.
Q. Did you ever row him down to Senecal's?
A. Yes, sir.
Q. Did you ever see him drink over at Lear's Hotel?
A. I never was at Lear's with him, I don't think.
Q. Where else did you see him drink?
A. I don't think I ever was in any other hotel with him than the Crossman and Mr. Senecal's. I don't remember that I ever was.
261
Q. Was this before 1881? What time of day was it that you saw him drink—these years before 1881—if you saw him drink?
A. I saw him take a drink in the morning and saw him take a drink in the evening.
Q. How often did you see him do that?
A. I can't tell you.
Q. How often, as to its being every day or not?
A. Well, I couldn't say that. Every day that I was with him I saw him drink.
Q. How often were you with him?
A. I wasn't the permanent man for Mr. Davy. I was just called for odd days, but I should think maybe some two years, at odd times.
Q. Did you see him drink on these occasions?
A. Yes, sir.
Q. Where did he drink besides at the bar and at Senecal's?
A. I saw him drink in the boat.
Q. Who brought the liquor along?
A. He generally would bring his own flask along. He generally had his flask in his pocket, and if he bought his liquor at any other place when I was with him I generally carried it myself.
Q. How was it, as to buying liquor, when you went out with him?
A. He bought it; I never did.

Q. How often did he do it—every day?
A. Not every day, because I didn't go to those places with him every day.
262 Q. I mean when he went to those places?
A. Generally when we went to Senecal's he would buy some.
Q. How long would his flask last—until what part of the day?
A. I can't say exactly.
Q. Did it last until noon?
A. Sometimes it would.
Q. Any longer?
A. Well, I wouldn't say; generally had liquor on the boat anyway.
Q. Did it last any longer — noon?
A. I can't say. He might have some left in it at noon. That I couldn't say.
Q. When you went down to Senecal's, how about his drinking there? On your arrival what did he generally do?
A. Generally took a drink.
Q. How many times did he drink before dinner?
A. I can't say; once, anyway.
Q. How long did he stay to Senecal's?
A. Sometimes two or three hours.
Q. Then what was his condition, as to being under the influence of liquor, when he would get down to Senecal's, any years he was with you? Can you specify years separately from each other?
A. I can't. I told you so on the start. I have seen him and thought he was under the influence of liquor.
Q. How about it generally?
A. I don't know.
Q. Give us the fact as it was.
A. I say I don't know.
263 Q. What kind of liquor did he generally use?
A. He used Hennesy brandy generally when he was with me.
Q. Did he ever use any other kind of liquor besides Hennesy brandy; if so, what was it?
A. I think I have seen him take a drink of gin.
Q. There was one occasion when you went to Senecal's, which I wish you would describe to me, when he slept.
A. The question has not been asked me.
Q. Do you remember an occasion when you went down to Senecal's with him, or when you meet him at Senecal's, when he went to sleep?
A. I saw him asleep once.
Q. Where was that? Describe it.
A. I was with him there that day; it was out under a shade tree, on the grass; it was a very warm day and no fishing.
Q. Did you find him out there?
A. I was with him when he laid down; it was in front of the river; I was right there.

Q. Do you remember what was his condition, as to being under the influence of liquor, that day?

A. That is a question; I would suppose he was under the influence of liquor.

Q. Is that what you thought at that time?

A. That is what I thought at that time.

Q. Describe his condition, as near as you can, with reference to his being intoxicated.

A. He was intoxicated; that is the best of my opinion; I don't know as I can put it in any other way; I have to say yes or no.

264 Q. Did he or not go to sleep that day?

A. Yes, sir.

Q. How long did he sleep?

A. I think we were there until somewhere about three o'clock; I won't say exactly.

Q. Then after he waked up did he do anything about drinking; and, if so, what?

A. He took a drink and then we started back right after that; that was the last day I was with Mr. Davy.

Q. When he got into the boat what was his condition, as to being intoxicated?

A. When he got into the boat he was all right.

Q. What took place? Now, tell us all about that going back up the river; tell us just as it was.

A. I don't know what you want to know.

Q. Describe what took place in going up the river. Where was he sitting?

A. On the stern seat of the boat, in my skiff.

Q. Was it a chair?

A. Yes, sir.

Q. How about his movements, were they steady or unsteady?

A. Before we got up to the bay they were a little unsteady.

Q. Did you say anything to him about sitting there?

A. I did.

Q. What did you tell him?

A. I told him I thought that he had better get in the bottom of the boat.

Q. What did he do?

265 A. He slid off the seat into the bottom of the boat.

Q. Was he intoxicated then, or not?

A. He was intoxicated, to the best of my opinion.

Q. Another year did you meet him down at Senecal's?

A. Yes; several times I met him there when I was not rowing him.

Q. Do you remember of any occasion when a search was made for him down there?

A. Yes, sir.

Q. Tell us about that.

A. He was missing, and we went to look for him.

Q. Did you go?

A. I did.

Q. Where did you find him?
A. In Mr. Senecal's orchard.
Q. What was he doing?
A. Lying on the grass.
Q. Did he have anything in his hand?
A. Had a revolver.
Q. What was his condition then, as to being intoxicated?
A. I think he had been drinking; I know he had.
Q. Seen him drink, hadn't you?
A. Yes, sir.
Q. When you were with him, about what was the average quantity that he drank while you were on the river? As near as you can, give the time and place.
A. I can't say as to that.
Q. While he was with you?
A. Sometimes he would drink more than he would others.
266 Q. Did he drink frequently?
A. Yes, sir; he drank frequently, but not all times—not every day.
Q. Did you see him in 1881?
A. I did in 1881, if that was the year he died.
Q. What was his appearance then?
A. Mr. Davy looked like a sickly man.
Q. Did you form any opinion from his appearance as to whether liquor had anything to do with it? Did he, or not, look to you as if he was a man that drank too much liquor?
A. He looked like a man that drinked, to me; I am not a doctor.
Q. Did you ever know Mr. Davy to go out in the boat with you without liquor?
A. No.
Q. Did you ever know him to drink any milk punch?
A. No, sir.
Q. Did you ever see him when you didn't think he was under the influence of liquor?
A. Oh, yes; I have seen Mr. Davy get up in the morning and come down stairs, I should judge, from his bed, and I don't think he was under the influence of liquor.
Q. How about during the middle or latter part of the day, did you ever see him when you did not think he was under the influence of liquor?
Q. I will put it in a different form: Other than in the morning, what was his condition as to being under the influence of liquor whenever you saw him?
267 A. That is a hard question to answer, but I will answer it in my way. When he was with me I can't say any afternoon but what I knew he had been drinking liquor, but I saw him other times when I couldn't say any such thing.
Q. Did you see him in 1881 at all in the billiard-room or bar-room?
A. I saw him in the bar-room once.
Q. Did you see him drink?

A. Yes; I drank with him.
Q. Did any one ever go in the boat with he and you?
A. Never with me.
Q. Was he or not always alone?
A. Always alone with me.
Q. As to his being lame or stiff in any way, not having the use of his limbs, did you ever notice anything about that?
A. Yes; I did, in this way: After he would be sitting in the boat for some time and would go to get up he would act as if he was stiff in his limbs from sitting in the boat.
Q. As every man is?
A. Yes; I get stiff myself.
Q. Apart from that, did you ever notice any lameness or stiffness about him at all?
A. I don't think Mr. Davy was a man that had the use of his limbs right from the way I have seen him walk and act. Of course, I don't know.
Q. Was Mr. Van Horn or Mr. Clark ever in the boat with you?
A. No, sir.
Q. Did you ever row them?
A. No; but I was acquainted with Mr. Van Horn; met
268 him with Mr. Davy.
Q. Did Mr. Davy's flask sometimes give out while he was in the boat or not?
A. It has given out.
Q. What did he do or say then?
A. If we were fishing he would say, Well, I guess we had better go to Mr. Senecal's or some place and get a drink.
Q. What did you do then?
A. We went to Senecal's sometimes and I think I did stop once to Mr. Benson's on Pine Island.
Q. In what form did you buy your liquor at Senecal's?
A. In a bottle; generally bottle of brandy.
Q. What sized bottle?
A. Quart bottle, supposed to be the best.

Cross-examination by Mr. BULGER:

Q. You rowed Mr. Davy in 1881, the year of his death?
A. No, sir.
Q. Did you row him at all in 1881?
A. No, sir; I did not.
Q. Didn't see much of him at all that year?
A. I think I saw him twice.
Q. Once at the Crossman House?
A. And I think I met him on the street somewhere close by the Crossman House. He was walking one evening.
Q. Walked all right?
A. Yes; then he did.
Q. Sober on both occasions, so far as you recollect. You saw nothing to the contrary.

A. No, sir; nothing to the contrary.

269 Q. Was one of these occasions the week of his death?

A. No, sir; it was shortly after he came there.

Q. You did not see him at all the week of his death?

A. I don't think I did.

Q. You rowed him three days the year before that?

A. The last year that I rowed him, about two or three years before he died. I can't say exactly. It was a good while ago.

Q. And you only had him then for three days?

A. Yes; and I think Mrs. Davy was there then.

Q. You say that when he got into the boat after he had been down to Senecal's that he was all right and appeared perfectly sober, but on the way up he laid down in the bottom of the boat?

A. Yes, sir.

Q. Was he sick?

A. Yes, sir.

Q. Often complained of being sick, didn't he?

A. I don't know. He was sick that day and vomited.

Q. Often complained of being sick in your hearing?

A. I have heard him say he was not well.

Q. Wasn't he a sickly looking man?

A. Not as I remember.

Q. Didn't he have a hectic, consumptive look?

A. I told Mr. Strong I ain't a doctor.

Q. You have seen people afflicted with pulmonary diseases. Did he have that appearance?

A. I thought he was too fleshy. He didn't look to me so.

Q. Did you ever hear of his having hemorrhage of the

270 lungs while he was at the island?

A. I never heard nothing about it; no, sir; he never did when he was with me.

Q. You have told all you know that occurred during the three days that you had him?

A. I told Mr. Strong; yes, sir.

Q. You said he walked as though something was the matter of his limbs or feet; didn't have the right use of his feet?

A. No; I said he walked to me as though there was something wrong with his limbs or perhaps it was his way.

Q. You didn't know he had two sprained ankles?

A. It appears as though I had heard something about it, but I don't know what.

Q. Did you hear that he got his feet caught in a railroad frog?

A. No, sir; never heard that, as I remember of now.

Q. You did hear that he had injured himself in some way?

A. I think I heard something about his having a sprained ankle, but it was so long ago I have a faint recollection of it.

Q. Did he use a cane?

A. I won't swear; it appears to me that he used to have a cane, but I won't swear whether he had or not; I don't remember exactly; can't say.

Q. You are inclined to believe that he had a cane?

A. I have answered your question.

Q. Is that your best recollection?

A. I won't swear whether he did or not; it seems to me
271 that I have a faint recollection that he used to carry a cane, but I won't swear that he did.

Q. The middle of the day when you rowed him there, those three days, it was very sunny and warm on the river, wasn't it?

A. Yes; one day in particular it was very warm.

Q. And people generally went to the shade instead of staying upon the water?

A. Great many people would do it.

Q. Wasn't that his custom, to go off from the water during midday and go and lie down in the shade somewhere until the heat of the sun had passed?

A. Mr. Davy was a man that if the fish didn't bite and he couldn't catch them he didn't like to stay out there and he would go to the shade.

Q. Senecal's place was a place where meals were served?

A. Yes, sir.

Q. And all these places where he stopped they served meals?

A. That is the only place where I stopped; I only called at one other place.

Q. Where was that?

A. Mr. Benson's.

Q. Isn't it your recollection that he went to these places and had a lunch on these occasions when you stopped there?

A. Only to Mr. Senecal's with me.

Q. And it was his custom to order a warm dinner?

A. Yes, sir.

Redirect examination:

Q. Have you any recollection as to whether he carried a cane or not?

A. No, sir; I have no recollection one way or the other.

272 Q. Have you any recollection about it one way or the other?

A. Not enough to swear to it.

Q. Have you any recollection whatever as to his ankles being sprained?

A. Only as I told you.

Q. Have you any recollection about it?

A. I never knew it; never knew any such thing.

Deposition of Albert Root, taken pursuant to stipulation before Honorable C. H. Walts, at Watertown, N. Y.

ALBERT ROOT, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. STRONG:

Q. Did you know Mr. Davy by sight?

A. I did by sight. I am not personally acquainted with him.

Q. Where did you see him?
A. I see him about the Crossman House. I can't say exactly the spot, but about there.
Q. Did you ever hear him talk?
A. Some; not much.
Q. How did he talk? Describe his speech.
A. I thought he was kind of a slowish kind of a man to speak.
Q. How about his speech being thick or not?
A. At one particular time his speech was pretty thick.
Q. When was that?
A. The time I helped him out of the boat.
Q. What year?
A. The last year he was there.
Q. What day was it?
A. I can't tell the day of the week nor day of the month.
273 It was a few days before he died.
Q. Now, who was with him?
A. William White.
Q. Where did he come from?
A. He rowed in from the river—rowed in to the dock.
Q. Which direction did he come from?
A. I can't tell.
Q. Tell us in your own way what took place there?
A. He rowed him inside of the dock just close up to Crossman's barn, and as he rowed him in I stood on the dock and I stepped down and asked Mr. Davy if I should assist him out of the boat. He spoke as if he wanted I should help him out.
Q. Do you remember what he said?
A. I asked him if he wanted me to help him out of the boat, and he said yes; he wanted me to help him out.
Q. What was his speech when he said that?
A. His speech when he said that was thick. I could just understand that he wanted me to help him.
Q. You took hold of his arm?
A. Yes; I took hold of his right arm and Mr. White took hold of him and we helped him onto the dock. We steadied him onto the dock and I assisted him up to the Crossman House, along up the plank walk.
Q. Did anybody else assist him?
A. Me and Mr. White.
Q. You had hold of his arm and Mr. White was on the other side?
A. Yes, sir.
Q. Where did you go with him?
274 A. Went up to the Crossman House; not into the house, I didn't go.
Q. Where did you go?
A. I went up to the veranda; up to the south side of the house.
Q. What did you do with him?
A. Sat him on a chair on the veranda, and he stayed there.
Q. What was his condition at this time as to being intoxicated or not?

A. I took him to be intoxicated.

Q. Where did you leave him?

A. Left him sitting on the veranda.

Q. Was White with him?

A. White helped me up to the veranda with him, and I see him sitting there in a chair.

Q. Did anybody stay with him there, do you know?

A. No; I don't think anybody did.

Q. How long had you known him by sight?

A. I can't say for sure, but I had seen him there at different times. I had seen Mr. Davy there at the bay, but whether it was five years or ten I can't say.

Q. Where did you ordinarily see him?

A. I was around the Crossman House, but I can't tell what place.

Q. Did you see him in the bar-room?

A. Not to my knowledge. I can't say for sure.

Q. Did you observe what his condition was when you saw him around?

A. I didn't observe what his condition was, any more than I took it that he was a man that was a drinking man.

275 Q. How often did you see him?

A. I can't say how often I saw him, but I have seen him a number of times.

Q. Did you see him several times each year?

A. I don't say positively that I did.

Q. Did you see him in 1881 several times?

A. I saw him in 1881 more than once, but I can't tell how many times, because I noticed him with Mr. White.

Q. Whenever you saw him how did he appear to you as to being under the influence of liquor?

A. He appeared to me when I saw him as if he was a man that used liquor more than a man should; used too much liquor.

Q. Did you form any judgment from what you saw as to its effect upon him?

A. My judgment was he was using more than a man could use and stand it a great while.

Q. Were you around the Crossman House every day?

A. I can't say I was every day.

Q. In 1881 how many times did you see him?

A. I can't say how many times, but I was then occupied at the Crossman House, and I was there and helped him out of the boat.

Q. You were there rowing, weren't you?

A. That was my business.

Q. What is your best recollection as to having seen him every day during that time?

A. I can't recollect that I saw him every day, but I do recall of seeing him a few times during this last year that he was there,

276 but I can't recollect how many times, nor can I remember what day or what place I saw him, except on this one particular occasion I spoke of.

Cross-examination by Mr. BULGER:

Q. You have said that you saw Mr. Davy twice in 1881. Is that true?

A. I saw him one time in particular, and I saw him other times.

Q. Did you testify, in answer to Mr. Strong, that you saw him only twice in 1881? Yes or no.

A. I didn't testify that I only saw him twice.

Q. You saw him on one occasion when you assisted him from the boat?

A. I did.

Q. What day of the week was that?

A. I can't say.

Q. What month was it in?

A. I can't say.

Q. What time of day was it?

A. I can't give the exact time, but I will give as near as I can.

Q. Your best judgment as to the hour by the clock.

A. My judgment and best recollection would be about 4 o'clock.

Q. 4 o'clock in the afternoon?

A. I may be mistaken.

Q. Where else do you remember that you did see him in 1881?

A. I can't tell the exact spot.

Q. You have not testified before in this case anywhere, have you?

A. No, sir.

277 Q. When was it first indicated to you and by whom that you were to be a witness in the case of Mrs. Davy against The Ætna Company? That calls for a date and a name and a person only. We will divide the question, though: When was it that it was first indicated to you?

A. Last Friday. Now, I can't say whether it was Wednesday or Thursday, but it was not Friday.

Q. Some day last week?

A. Yes, sir.

Q. From whom did the information or suggestion come that you should be a witness?

A. It was Mr. Lawyer.

Q. And you understand he is a resident of Watertown?

A. I have always understood that he was.

Q. Did he see you at your house?

A. No, sir.

Q. Where did he see you?

A. He saw me at Mr. Cavanaugh's, in Mallorytown.

Q. How far from where you live?

A. Nine miles, it is called.

Q. In the same township?

A. Yes, sir.

Q. What were you doing up there that day?

A. My son sent word to me to come out to Mallorytown.

Q. Whom did he send word by?

A. My nephew. Mr. Lawyer sent word to me to come out.

Q. When you got to Mr. Cavanagh's house did you see Mr. William White there?

A. No, sir.

Q. Did you see William White that day?

278 A. No, sir.

Q. Did you see any of the witnesses here?

A. Yes, sir.

Q. Name them.

A. John Gibson and Josh. Senecal.

Q. They were at Cavanagh's house?

A. Yes, sir.

Q. And Lawyer was there and you were there?

A. Yes, sir.

Q. Then it was Lawyer told you that he wanted you to be a witness in this case?

A. Yes, sir.

Q. How did you know what he wanted you for? Did he tell you what he wanted you for?

A. He asked me what I knew, and I told him that I was the man that helped him out of the boat the last time he got out of a boat at Alexandria Bay.

Q. You don't know that that is true as matter of fact? You don't know whether he ever got into a boat again? You didn't watch him?

A. No; I did not.

Q. How much a day are you to have?

A. Three dollars a day and expenses.

Q. That included traveling and hotel business?

A. I suppose so; expenses included.

Q. What is your occupation at this season of the year?

A. I have a farm.

Q. Do you own a farm?

A. Yes, sir.

279 Q. Do you have deed of it in your own name?

A. Yes, sir.

Q. Of how many acres does it consist?

A. Ninety-one acres, and I hold a Government position, and there is 11 acres with that which I have the use of.

Q. What is your Government position?

A. Light-house tender.

Q. You tend light-house on one of these islands down there?

A. Yes; I own ninety-one acres adjoining those 11 acres belonging to the Government.

Q. Is it wild land?

A. No, sir; improved land.

Q. What stock do you keep on it?

A. Seven cows and a pair of horses and four head young cattle. There are times I have kept sheep. I have none now.

Q. In the winter time you have nothing to do?

A. Some days I get a few days' teaming and take folks across the river.

Q. You were a boatman down the river one time?
A. Yes, sir.
Q. And you have rowed hundreds of people on that river every season?
A. I can't say hundreds every season.
Q. We will say scores.
A. Some seasons not more than a few.
Q. And you have assisted many people in and out of boats each season?
A. Yes, sir.
Q. And assisted people who were under the influence of
280 liquor in and out of boats each season?
A. Yes, sir.
Q. And you never heard anything about the fact that you were suspected of having helped Mr. Davy out of the boat until last Thursday? Had you the slightest suspicion of anybody knowing that you helped him out up to last Thursday?
A. I knew Mr. White knew.
Q. Had you and White talked about it?
A. Yes, sir.
Q. When?
A. A number of times.
Q. How long ago?
A. We talked about it once this winter.
Q. How long after the occurrence was it that you and White talked about it?
A. I can't tell you.
Q. Some years?
A. It might have been, and it might have been the next year.
Q. It might have been five years?
A. I can't say.
Q. Have you any recollection when you and White first talked about it?
A. No, sir.
Q. Not the slightest?
A. I can't say.
Q. You don't know what day of the week it was that you helped him out of the boat?
A. No; I can't tell; have no memorandum of it and made
281 none at the time.
Q. How long have you lived where you now reside?
A. In that vicinity 53 years.
Q. Were you born there?
A. I was born in Grenadier Island.
Q. Canadian?
A. Yes, sir.
Q. You are a resident of Canada and always have been?
A. Yes, sir.
Q. And a citizen of that country?
A. Yes, sir.

Q. And would you have come here except for the agreement to pay you $3 a day and expenses to testify in this case?

A. I shouldn't have come if they hadn't paid me for it; no.

Q. You know they couldn't compel you to come?

A. I have heard they couldn't; that I am aware of, that they couldn't have made me cross that line.

Q. Do you know what time of the year it was that you saw Mr. Davy, in 1881, at the Crossman House dock?

A. Can't say whether it was July, August, or September.

Q. And it might have been 1st of June?

A. I don't think it was June.

Q. How far is your home from the Crossman dock?

A. Four miles.

Q. Down the river?

A. It is down the river, but it is across; not directly straight across.

Q. Diagonally across?

A. Yes; in plain sight of the Crossman House dock.

282 Q. How many times a year before he died did you see Davy?

A. I can't say that I saw him the year before.

Q. Can you name any particular place that you saw him the year before he died?

A. No, sir.

Q. Can you name any person in whose company you saw him the year before he died?

A. No, sir.

Q. The year before that or two years before that, can you name any place where you saw him?

A. No, sir.

Q. Can you name any particular persons in whose company you saw him?

A. No particular one.

Q. Or the third or fourth years before he died, can you?

A. No, sir.

Q. Or the fifth?

A. No, sir.

Q. The honest truth is that you don't know much about Mr. Davy, isn't that so, except that you have helped him out of the boat on this occasion?

A. As I said before, I am not personally acquainted with him, but I knew the man by sight.

Q. Did you ever exchange a word with him?

A. Yes, sir.

Q. Did he answer?

A. Yes; I have passed the time of day with him.

Q. Was that when you helped him out of the boat?

A. I don't know as I passed the time of day then. I asked

283 him if he wanted me to assist him out, and he said yes.

Q. Did he tell you at that time that he had had a bad hemorrhage in the boat?

A. No, sir.
Q. And did you observe that blood was in the boat?
A. No, sir.
Q. You don't remember anything about that kind of talk?
A. No, sir.
Q. How was he dressed when you were helping him out of the boat—in light or dark colored clothes?
A. I can't swear positively.
Q. What kind of a hat did he have on, black or white?
A. I can't tell.
Q. Did he have a light or black colored overcoat on?
A. I can't say positively what kind of clothes he had on.
Q. Did he have a pair of white-duck pants or trowsers on?
A. I can't say.
Q. Didn't he complain to you that he had been taken severely ill and was suffering very much?
A. No, sir; he did not.
Q. Did he complain in your presence in that way?
A. No, sir.

Deposition of James A. Root, taken, pursuant to stipulation, before Honorable C. H. Walts, at Watertown, N. Y.

JAMES A. ROOT, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. STRONG:

Q. You are not acquainted with Mr. Davy?
284 A. No, sir.
Q. And knew nothing about his personal habits?
A. No, sir.
Q. After his death did you see the body?
A. I did, of the man they called Mr. Davy.
Q. What did you have to do with it?
A. I simply called in to assist in embalming him; that was about all I done; sometimes the doctor would hand me something to hold, or undertaker.
Q. Who was there besides you?
A. Dr. Watson and William Henry Hunt.
Q. Hunt has testified here?
A. Yes; and the man at that time, I didn't know where he was from; he was the undertaker, and a man named Cornwall.
Q. Did you have anything to do with removing the body to the cottage?
A. Yes; I helped to carry the body from the hotel to the cottage.
Q. Who assisted also?
A. I can't just say who had hold of the body. Mr. Hunt for one, and, I think, Mr. Cornwall, and I don't know as Mr. Watson had hold or not; some one went ahead and I can't say who it was.

Cross-examination by Mr. BULGER:

Q. You don't know who it was that went ahead as you and the other men carried the body?

A. Not that I can swear to.

Q. What is your present age?

A. Thirty-three years.

285 Q. Your place of residence?

A. Rockport.

Q. Your occupation is what?

A. I am a sailor.

Q. Sailor in the navigation season on the lakes and during the winter season you have no occupation?

A. Nothing particularly.

Q. Are you a married man?

A. No, sir.

Q. Live with your parents?

A. Yes, sir.

Q. Father and mother both living?

A. Yes, sir.

Q. You are personally acquainted with all the other witnesses here?

A. Yes, sir.

Q. How long have you been sailing?

A. I can't just say as to that.

Q. Ten or twelve years?

A. Yes; I presume likely about that length of time.

Q. In what capacity?

A. In different capacities.

Q. Master of a vessel at any time?

A. Yes, sir.

Q. First or second mate?

A. I was, as you might say, first mate once.

Q. And deckhand and almost every capacity?

A. Yes, sir.

286 Q. And you have been in that business ten or twelve summers, generally speaking; certainly not less than ten.

A. I couldn't say just as to that.

Q. Not more than twelve?

A. I wouldn't say as to that. I have worked some off and on; sometimes in the fore part of the season I would work at sailing and then at something else.

Q. How did you happen to be there, if you were a sailor, at the Crossman House?

A. I was a boatman at the Crossman House.

Q. Did you ever know of any other person who died at the Crossman House?

A. I don't know as I can say as to that.

Q. You don't know whose body this was that you helped to carry, except as you heard people say?

A. I have no personal knowledge.

Q. You never saw the body, did you, until you went up that night?

A. I presume likely I have seen the gentleman, but I didn't know him.

Q. So far as you know you didn't know him until then?

A. No; not that I know of.

Q. What time was it in the evening that you saw the embalming process going on?

A. I think it was shortly after lamp light.

Q. Did you see any ladies about there?

A. Not to my recollection.

Q. Are you sure that Dr. Watson was there when the embalmer was at work?

A. Yes, sir.

287 Q. The body was then dressed?

A. Well, when they went to embalm him he had a pair of dark-colored pants on, and they were merely turned down; the flap was turned back. He had on a light-colored shirt or something. I can't tell whether it was a shirt or something else.

Q. You get the same compensation for your services here that the others get—$3 a day and expenses?

A. That is what I am to have.

Q. That includes car fare and all expenses?

A. Yes, sir.

Q. The body was carried out of the hotel at what hour of the evening?

A. I can't say what hour. I judge it was something like 9 or 10 o'clock.

Q. You know nothing about the body's removal next morning to the cars?

A. I went to the boat next morning.

Q. But you didn't go aboard the boat?

A. No, sir.

Q. You never testified in this action before?

A. No, sir.

Q. Who told you that you were expected to come here as a witness—Mr. Lawyer?

A. He is not the first man that spoke to me. The first man was Mr. Hunt. He said he thought I would be called on in this suit.

Q. That is the man who was sworn here to-day?

A. Yes, sir.

288 Q. Did he tell you for what you would be called?

A. He didn't tell me any particular points; he said he thought I would be called on; I didn't pay any particular attention, as I didn't think I would be called.

Deposition of Joseph Senecal, taken pursuant to stipulation before Honorable C. H. Walts, at Watertown, N. Y.

JOSEPH SENECAL, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. STRONG:

Q. Where do you live?
A. Grenadier Island.
Q. On the Canada side?
A. Yes, sir.
Q. What do you do there?
A. Keep boarding-house there—public house.
Q. Have a farm there?
A. Yes, sir.
Q. How long have you lived there?
A. 27 years and a little over.
Q. How long have you kept this boarding-house?
A. Ever since I have been there.
Q. Did you know William A. Davy in his lifetime?
A. Yes; some acquainted with him.
Q. How many years had you known him before his death?
A. I can't tell exactly, but, as near as I can recollect, ten or twelve years.
Q. Did he ever come to your house?
289 A. Yes; once in a while he came there to dinner.
Q. Who did he come with?
A. He came there with Mr. White and Mr. Gibson.
Q. Witnesses who were on the stand here?
A. Yes, sir.
Q. Did you see him there in the year 1881?
A. Yes, sir.
Q. That is the year——
A. The last time he came there.
Q. Did you see him several years before that?
A. Once in awhile he would come to the house.
Q. How often did he come to your place in 1881?
A. I can't say how many times; I know he came there twice.
Q. Did he come there as often as once every day? How many times a week on an average did he come?
A. Twice or three times.
Q. Now, when he came there he was with Mr. White, you say?
A. Yes, sir.
Q. What was the first thing he did when he got there?
A. He called for his dinner.
Q. And then what would he do—what did he do?
A. He took a drink once in awhile.
Q. How many times did he drink before dinner?
A. Sometimes once, sometimes twice.
Q. Then what did he do about dinner?
A. Ate his dinner.

Q. After dinner what did he do?
A. Sometimes took a drink.
Q. Then what did he do?
A. Then if he was all right he would go fishing; if he was
290 not he would take a nap; lay down and sleep.
Q. What was his condition as to being under the influence of liquor when he came to your place?
A. The last time he came there he was in the worst condition I ever saw him before.
Q. Before the last time I want to ask you about. What was his condition generally as to being under the influence of liquor when he came there—as to his being intoxicated?
A. He had been drinking quite freely, I guess.
Q. Was that the case whenever he came there?
A. Generally.
Q. What was the last time he was there which you have alluded to?
A. When I came to the house he was sitting down on the stoop.
Q. Do you remember what day that was?
A. No; I can't remember. It was the last time he came there.
Q. He was sitting on the stoop?
A. Yes, sir.
Q. Describe his condition.
A. He was quite stupid.
Q. From what, do you know?
A. From liquor, I suppose.
Q. What did his appearance indicate to you?
A. I knew he had been drinking.
Q. What did you do then?
A. He sat there a spell, and White told me he wished I would coax him to go to bed.
Q. Did you speak to Davy about going to bed?
A. Yes, sir.
Q. Was he drunk or not at this time?
291 A. Yes, sir; he was pretty tight.
Q. You spoke to him about going to bed?
A. Yes; I tried to coax him to stay all night and go to bed.
Q. Did he go to bed?
A. Yes; he went to bed.
Q. About what time?
A. About 8 o'clock, I should say.
Q. How long did he stay in bed?
A. Until between 11 and 12.
Q. Then what took place that night?
A. He wanted I should put Mr. White in a room close by in case he wanted him at night he could call him, so about 12 o'clock he called him and told him he wanted to go to Alexandria Bay.
Q. Were you in bed then?
A. No, sir.
Q. Was White in bed?
A. Yes, sir.

Q. Did you say anything to Mr. Davy that night about going to Alexandria Bay?

A. No; when he came down I tried to coax him to stay all night and get up early in the morning and go to the bay.

Q. What was his condition at this time when he got up?

A. He was pretty weak.

Q. As to his being intoxicated?

A. He looked as though he had had a pretty hard time of it.

Q. Hard time of it from what?

A. Getting over his drinking spell.

Q. Did he appear to be over it then, or was he still intoxicated?

292 A. He didn't appear to be much better than he was when he went to bed.

Q. What then was done?

A. He said he must and should go; and so Willie White and I took him down to the river and put him in the boat.

Q. How do you mean took him down to the river; did you assist him?

A. Yes; put him in the boat.

Q. What was there about him that made it necessary to assist him?

A. I suppose he had been drinking too hard; I knew he had been drinking. Of course I can tell whether a man has been drinking or not.

Q. Did he go off then?

A. Yes, sir.

Q. What kind of a night was it?

A. It was a pretty dark night, and wind blew some.

Q. When he came to your place, aside from the drinking to which you have testified before dinner and after dinner, did he get any liquor from you?

A. When he was short of liquor he would take a bottle.

Q. What was it?

A. Brandy.

Q. What was his practice in that respect?

A. He always made a practice when he came if he was short of liquor to get some to last the day out.

Q. Did he generally buy it?

293 A. Yes; he generally bought it.

Q. How often; every time he came there?

A. Some of the time if he got liquor enough to last him he wouldn't buy it.

Q. But generally.

A. He generally took a bottle.

Q. Do you remember an occasion when he was there when you hunted him up?

A. He came there with Gibson, I think, and he had been drinking quite a lot then, and he went after dinner and laid down in the orchard somewhere, and we looked for him and couldn't find him,

and I went out with him and two or three of us found him in the orchard.

Q. What was he doing?

A. Laying down asleep.

Q. Do you know whether he was asleep or not?

A. He looked as though he was.

Q. Was there anything that you noticed that he had about him; anything in his hand, or anything like that?

A. Yes; he laid down there with a revolver in his hand.

Q. What did you do with him?

A. Woke him up.

Q. What was his condition then as to being intoxicated?

A. He was not quite as bad as he was when he went in the orchard.

Q. How was he when he went in the orchard?

A. Quite tight then.

Q. Did you ever see him there at your place when he did not appear to be intoxicated?

294 A. I see that he had been drinking somewheres sometimes; of course sometimes he did not show it as bad as he did other times.

Q. What was his condition generally when he came to your place?

A. He could walk to the house pretty straight and get his dinner.

Q. Did he or did he not appear to you to be under the influence of liquor, more or less?

A. Not very often.

Q. Not very often what?

A. But what he had liquor.

Q. Can you remember the dates and days of the month when these things occurred?

A. I can't.

Q. Can you separate these things and tell what happened upon any one day and what happened on another day; is there any way you can do that?

A. No; I can't do it. It was quite awhile ago and I never had it in my mind.

Cross-examination by Mr. BULGER:

Q. How do you spell your name?

A. S-e-n-e-c-a-l.

Q. And you have lived on Grenadier Island how many years?

A. Over 27 years.

Q. Where were you born?

A. I was born in the lower province.

Q. In what town?

A. Montreal.

Q. City of Montreal?

A. No; about 15 miles below.

295 Q. What is the name of the place?

A. Chamblis.

Q. What year were you born; do you know?
A. I don't know whether it was 1814; I can't tell exactly the year; if I was at home I could tell.
Q. What is your present age?
A. Seventy-one.
Q. How long did you live at Chamblis?
A. Not a great while.
Q. How many years?
A. I was a small, little shaver when I left there.
Q. Where did you go?
A. Vermont; my father went there.
Q. How long did you live in Vermont?
A. Five or six years.
Q. Then you went where?
A. Went to New York State.
Q. Where were you living in New York? Where were you living when you were 21 years of age?
A. I was in Redwood.
Q. What State is that in?
A. Jefferson county, New York.
Q. How long did you reside in Redwood, Jefferson Co.?
A. I was brought up there.
Q. How many years did you live there after you became 21 years of age?
A. I can't tell exactly; lived there all the rest of my days, pretty much.
296 Q. Were you 21 when you came to Redwood?
A. No, sir.
Q. How old were you when you came to Redwood?
A. Fourteen.
Q. And you lived there how many years?
A. I lived there my lifetime.
Q. How many years?
A. I can't tell you.
Q. That can't be; you are still alive and living on Grenadier Island. How long did you live at Redwood?
A. I left Redwood to go on the island.
Q. How long have you lived on the island?
A. I can't tell exactly.
Q. 27 years?
A. Yes, sir.
Q. Then you have not lived at Redwood in the last 27 years?
A. No, sir.
Q. When did you first know Mr. Davy?
A. I can't tell.
Q. How many years before he died was it that you first knew him?
A. I can't tell.
Q. Did you know him ten years before he died?
A. He might have been there a great many times and I not get acquainted with him.

Q. How many years was it before he died that you remember getting acquainted with him?

A. Maybe four or five years.

297 Q. Do you know what year it was he died in?

A. I can't tell that.

Q. How many years ago was it?

A. It must have been 1881, or about that, I should think.

Q. Will you swear it was in 1881 he died?

A. I will swear it was about that.

Q. Will you swear he died in 1881? Yes or no.

A. Yes; died in that year.

Q. Will your swear to that?

A. I can't swear positively, but I am pretty sure it was.

Q. How many years ago was it that he died from now?

A. Nine years, about.

Q. Nine years last summer or next summer?

A. It don't matter. I know when he died; pretty near the time, anyway.

Q. What time of the year was it when he died?

A. Along in the summer.

Q. What month?

A. I can't tell you.

Q. Was it in September?

A. I can't tell what month it was.

Q. How many years ago was it that Mr. Davy died?

A. Just about nine years ago.

Q. Nine years ago last summer?

A. I should think so. I can't tell whether it was last summer or next summer; it was in 1881, I think.

Q. You don't know what month it was, whether it was June, July, August, or September?

A. No; I don't remember.

Q. How many times was he at your place at Grenadier

298 Island in that year of his death?

A. I can't tell you that.

Q. Did you see him that year at all there?

A. Yes, sir.

Q. How many times do you remember?

A. I saw him twice.

Q. Can you give any idea as to when the first time was?

A. No; because it has been so——

Q. You can't give the time?

A. No, sir.

Q. Can you give me any idea when the second visit was?

A. It was before he died.

Q. When was the second visit—you saw him there twice?

A. Before he died, the last time was.

Q. He never died but once. What was the distance between the first and second times you saw him—how many days intervened between the two visits?

A. It might have been two or three days.

Q. Wasn't it a greater number of days than three?
A. I can't tell positively.
Q. Do you think it was two or three days?
A. About that time.
Q. There wasn't a week between the times?
A. No, sir; there was not.
Q. You are sure of that?
A. As near as I can recollect.
Q. Do you remember what day of the week it was he died?
A. No; I can't tell you that.
Q. When did you first hear of his death?
299 A. Two or three days after his death.
Q. Who first told you about his death?
A. I heard of it. Some one came to my house told me.
Q. Who was it?
A. I can't tell.
Q. So you don't know when he died?
A. Fishermen that stopped there, you know, told me.
Q. You don't know what day of the week he died?
A. No, sir.
Q. And you don't know what day of the week he was at your place on either occasion?
A. No, sir; I know it was the last week he died.
Q. You took him down to the boat. Did you assist him to the boat in the day-time when he was there?
A. No, sir.
Q. And at night you and William White took him to the boat together?
A. Yes, sir.
Q. Talked all right, didn't he?
A. He didn't say much of anything.
Q. What little he did say seemed to be well said and intelligibly said, didn't it?
A. Not as well as he might.
Q. You had no difficulty in understanding him?
A. I understood him well enough.
Q. You say you found him in the orchard once?
A. Yes, sir.
Q. Was that the time when the other witnesses who were with you say he had a pistol?
A. Yes, sir.
300 Q. Did you see the pistol?
A. Yes; I saw it; they were looking for him and I happened to come and found him.
Q. Describe the pistol.
A. I can't tell that.
Q. What were you looking for him for?
A. They were looking for him and I stepped in the orchard with them.
Q. That was a common thing, for people to go into your orchard

and lie down in the midday, in the heated part of the day—for people to stop on Grenadier Island?

A. It was free for them to go. Everybody don't go there and lie down.

Q. The place was open to visitors—everybody who pleased to go there?

A. It was free; yes, sir.

Q. Were there apples there at that time?

A. I can't say whether there were, but I think there were.

Q. How large is that orchard as to acres of land?

A. Must be two acres; then I have another one of five acres.

Q. I am speaking of this one where Mr. Davy was.

A. About two acres.

Q. Who were the men who were with you when you found him there?

A. I know Gibson was one of them, and there was another man.

Q. Who was he?

A. I don't recollect.

Q. But you are sure Gibson was there.

A. Yes, sir.

301 Q. That was the Gibson who was sworn here to-day?

A. Yes, sir.

Q. Now, you are the first man and Gibson is the second. Who is the third?

A. I don't know.

Q. Ever see him before?

A. Yes; but it has slipped my mind entirely, and I don't know who it was, because it was some one who was not interested.

Q. How long have you known Mr. Gibson?

A. Ever since I have been there.

Q. 27 years?

A. Yes, sir.

Q. How long have you known Mr. Hunt?

A. I have known him not quite so long, because he lives quite a ways away.

Q. Some ten or twelve years?

A. Yes, sir.

Q. How long have you known Mr. White?

A. Ever since I have been there.

Q. 27 years?

A. Yes, sir.

Q. Stopped at your place two or three times a week?

A. Yes, sir; he is a fisherman and stops there.

Q. And has been for 27 years, hasn't he?

A. Yes, sir,

Q. You served dinner there to guests?

A. Yes; they stopped to eat.

Q. Do you remember how much you charged Mr. Davy for

302 brandy—how much he paid you?

A. $2 a bottle.

Q. Pints or quarts?

A. Quarts.
Q. Did you ever see anybody else to dinner with him at your place?
A. I have seen lots of people boarding there that he always had——
Q. Did you ever see Mr. Davy bring anybody else to dinner with him?
A. No; except Mr. White. They always had dinner together.
Q. Did he always have dinner with him?
A. Yes; sometimes, though, he wouldn't have dinner.
Q. How was it in 1881?
A. It was the same thing.
Q. Don't you know that your friend White was the third man who saw the revolver scene?
A. I can't say.
Q. How was Mr. Davy dressed that day that you saw him lying on the grass?
A. I don't know anything about his clothes at all.
Q. Why don't you know?
A. Because I never notice a man's dress.
Q. Did he have a pair of white duck pants on?
A. I can't tell what pants or clothes he had on.
Q. Did he have a white vest on?
A. I can't tell.
Q. Was the general character of his clothing white or black?
A. I can't tell that.
303 Q. What did he have on his head—a hat or a cap?
A. I can't tell.
Q. Do you know whether or not he had a high silk hat?
A. I don't know what he had on.
Q. Don't know anything about that?
A. No, sir.
Q. Remember which hand he had the revolver in?
A. Yes; I remember that.
Q. Had he been shooting at a mark just before that?
A. No, sir; I don't know that.
Q. Do you know whether he had or not?
A. He slipped away and we didn't know where he had gone.
Q. You didn't see him slip away?
A. No, sir.
Q. Then you don't know that he slipped away? You don't know but that he walked boldly away?
A. No, sir.
Q. Did you ever see his wife there to dinner with him?
A. Seems to me I did once.
Q. Did you see her there in 1881?
A. Not that I remember.
Q. Did he ever buy more than one bottle of brandy in any one day at your place?
A. Yes; I remember once his buying two bottles.
Q. What year was that?
A. That was the year before he died.

Q. Was his wife with him then?

A. I don't remember.

304 Q. Was that along towards the latter part of the season?

A. About fishing time.

Q. Along towards the first or middle of September?

A. Not as late as that.

Q. When do you think it was, then?

A. I don't know. If I did I could tell you.

Q. Did he buy some brandy at your place and tell you that he was going to take it home and make a present of it to his brother and some other friend?

A. No, sir.

Q. Will you say that he did not tell you that at one time?

A. No, sir.

Q. What is your business away from the house?

A. I work a couple of hundred acres of land.

Q. You were not at the house much of the time?

A. Yes; I am quite a good deal at the house. I run a steamer there.

Q. What uniform do you wear? Are you in the service of the Government in any capacity?

A. I do a little of everything.

Q. What does that uniform represent, if anything?

A. Steamboat captain.

Q. You are not in the employ of the Canadian Government in any way?

A. No, sir.

Q. Along in July is about your haying time, isn't it?

A. Yes, sir.

Q. Pretty busy man with two hundred acres of land, aren't you?

A. I hire help.

305 Q. You superintend in the field?

A. Yes; I boss it—give my orders; then I have enough to tend to in the house without going to the field to work.

Q. Do you remember what particular kind of work was being done on the farm in 1881 at the time Mr. Davy was there?

A. No, sir.

Q. Don't remember whether it was haying, harvesting, or hoeing time?

A. No, sir.

Q. You spoke of his lying down one time and getting up about midnight and calling Mr. White and going home?

A. Yes, sir.

Q. You were not there when he called Mr. White? That was in the cottage and you were over to the house?

A. That was all I had.

Q. Isn't there some sort of a cottage from your place?

A. No, sir.

Q. This was right in your dwelling-house?

A. Yes, sir.

Q. You don't know what business called him to the bay that night?.

A. No, sir; I do not.

Q. Have you testified as a witness in this case before?

A. No, sir.

Q. This is the first time?

A. Yes, sir.

Q. Who first told you that you would be expected to be a witness in this case?

A. Mr. Lawyer.

306 Q. That was last week some day?

A. Some day last week, I think.

Q. Had he ever talked with you before prior to any trial of the case?

A. No, sir.

Q. And under what arrangement as to receiving payment for your time and services are you?

A. He said if I would come he would pay me three dollars a day and expenses.

Q. Did he advance you any money before you started?

A. No, sir.

Q. Grenadier Island is under the jurisdiction of the Canadian Government, isn't it?

A. Yes, sir.

Q. Would you have come here if they had not promised to pay you to testify in this case?

A. I don't think I would. I didn't like to come as it was.

Q. You knew that the courts upon this side of the line could not compel you to come?

A. Yes, sir.

Q. You understood that?

A. Yes, sir.

Q. Were you present when Mr. Strong read from what we have been calling the testimony book last night?

A. No, sir.

Q. You did not hear him read anything from a book like this one?

307 A. No, sir.

Q. Did you stop at the Globe Hotel last night?

A. I did.

Q. You knew that Mr. White was stopping there?

A. Yes, sir.

Q. Didn't you see Mr. Strong there at all last night?

A. He was there awhile.

Q. Was he there last night; yes or no? Did you see Mr. Strong at your hotel last night; yes or no?

A. No.

Q. Did you see him at any time since you have been at Watertown?

A. Yesterday afternoon.

Q. Did he have a book similar to this in appearance?

A. No, sir; I didn't see any.
Q. Did you see any book?
A. No, sir.
Q. Did he talk with you about your testimony in this case?
A. Yes, he did; but he had no book.
Q. Did you tell him what you could swear to?
A. No; I did not.
Q. Did he ask you?
A. He asked me if I knew anything and I told him I did.
Q. Then you went on and told him what you knew?
A. As near as I could.
Q. Was White present when you told him that?
A. I don't remember.

Q. Was Hunt present?

308 A. No; but I think Mr. Gibson was present, and I don't know but White was present for all I know.

Q. In whose room was it?
A. I can't tell.
Q. Was it a public room? Was there a bed in the room?
A. Public room.
Q. All you men, White, Gibson, Root, and yourself, all the witnesses, came over together?
A. Yes, sir.
Q. Came on the same train and same car and talked about this matter on the way?
A. Don't know as we did.
Q. Did you talk about this case on the way up?
A. There was no necessity for it.
Q. Did you speak of it?
A. Yes; there was some talk about it.
Q. Lawyer with you?
A. Yes, sir.
Q. And he talked about the case on the way?
A. He was the only one that was with us.
Q. You all talked with him about the case?
A. When he talked about it, of course.
Q. Where did you see Lawyer; at your house?
A. Yes, sir.
Q. He paid your fare up there?
A. Yes, sir.
Q. Paid the fare for the whole party?
A. I suppose he did. I know he paid mine.
Q. He took you to the Globe Hotel and made arrangements for your staying there?

—. —.

309 Q. Name the first person to whom you told the story of Mr. Davy getting up at midnight and asking to be brought up to the bay.
A. I don't know as I ever told any one.
Q. You must have told it to some one or how would this gentleman know to ask you about it?

A. I heard Mr. Gibson talk about it.
Q. Did you ever tell anybody this story?
A. Not until this came up.
Q. Who was the first person whom you told this story of Davy getting up at night and asking to be taken to the bay?
A. Mr. Gibson was talking about it.
Q. That was the first person whom you told?
A. That was the first person who asked me about it.
Q. He was the first person you told, is it?
A. The rest was talking about it.
Q. Is he the first person whom you told this story to?
A. Gibson knew all about it.
Q. Is he the first person you told it to?
A. The first person I told the story to after Mr. Lawyer. I didn't remember anything more about it, of course, but Mr. Lawyer came up and he wanted to know if I knew anything——
Q. I don't care about that.
A. I am going to tell you I told Mr. Strong about it.
Q. Where did you tell Mr. Strong?
A. He was at my place.
Q. When was he at your place?
310 A. I don't mean Strong; I mean Lawyer.
Q. That was the second person you told?
A. He is the first person who spoke about it.
Q. Who is the first after Gibson?
A. I said I heard Gibson talking about it, and he talked to Mr. Lawyer about it.
Q. Who did you talk about it with after Gibson?
A. I didn't talk to anybody after Gibson, because Gibson knew as much about it as I did.
Q. Did you talk with anybody about this trip up the bay between the time you talked with Gibson and the time you talked with Lawyer?
A. Mr. Lawyer and Gibson were together, and they got talking about it.
Q. What did you tell them?
A. I told them I remembered it.
Q. Did you talk with anybody between your first talk with Gibson and the talk with Gibson and Lawyer about this trip?
A. They were both together.
Q. After you talked with them did you talk with any one?
A. No; not with anybody since.
Q. Then you have only talked with these two men—Mr. Lawyer and Mr. Gibson?
A. That is all. I never remembered any more about it until they spoke to me about it.
Q. And that was last week some time?
A. Some time last week.
Q. And then it all came back to you?
A. I couldn't help but remember it.

311 Q. Wasn't it a common thing for fellows to stop at your place at different times of night and go away at different times at all times of the season?

A. No, sir.

Q. Didn't you have belated men?

A. Sometimes.

Q. So it is not an uncommon thing? Boats are up and down all the while all summer long?

A. Yes; but they don't make a practice of stopping there.

Q. Did it pass from your mind until White and Lawyer called your attention to it?

A. I didn't remember about it until they spoke about it, and then, of course, I couldn't help but remember.

Q. Have you told all you know about that trip?

A. That is all.

Q. How many days between the time that he went up there at midnight and the time you heard of his death?

A. It was only four days—maybe five for all I know. Some one came up and told me he was dead.

Q. Think it may be as long as a week?

A. I can't say as to that.

Q. Swear it was not a week?

A. I won't swear to anything about it because I only know what I have told.

312 Redirect examination:

Q. Did you tell what you knew first to Mr. Lawyer or to Mr. Gibson?

A. Mr. Lawyer was come there, you know.

Q. Did you tell it to Lawyer and Gibson together?

A. Yes; he asked me if I remembered when he was in the orchard, and I told him I did.

Q. People have often gone into your orchard to go to sleep and take a nap, or haven't they—which?

A. Of course any one can go and sit in the shade.

Q. Do they often go in the orchard and use it for a sleeping place?

A. Not very often.

Mr. BULGER: They do sometimes, don't they?

A. People that board there, of course. You know they get in the shade somewhere.

Q. Got any seats there for people in the orchard?

A. No, sir.

Q. Can you tell me how Mr. Davy was dressed at any time you saw him in 1881?

A. I can't tell anything about it.

Q. Whether he was dressed in a white linen suit or black suit?

A. I can't tell anything about it.

313 Dr. JOHN W. WARD, produced and sworn on the part of the defendant, testified as follows?

Direct examination (by Mr. STRONG):

Q. What is your profession?

A. Physician, and have been such since March, 1867. I reside at the asylum for the insane near Trenton. My official title in connection with that institution is superintendent and physician. I have been superintendent of the institution for 23 years on the 14th of May next.

Q. Have you had any experience in the treatment of cases of alcoholism?

A. I have had quite an experience.

Q. Have you cases under treatment at the present time?

A. Yes, sir.

Q. Do you consider yourself qualified to express an opinion as to the effect of the excessive use of alcoholic liquor and the diseases arising from such use?

A. To the extent of my experience, yes.

Q. Which runs into how many cases, would you say?

A. Two or three hundred; three hundred, probably, within bounds.

Q. Have you seen and treated cases of excessive alcoholism both where delirium tremens did and did not occur?

A. I have.

Q. And what are *to* most common symptoms arising from the use of alcoholic liquor other than delirium tremens?

A. Various troubles; cirrhosis of the liver; indigestion; inflammatory diseases of the stomach generally.

314 Q. Insanity?

A. Yes, sir.

Q. Please explain what you mean by cirrhosis of the liver.

A. Cirrhosis of the liver is an inflammation of the connective tissue between the lobules of the liver and usually due to the excessive use or to the use of alcohol.

Q. Those lobules are connected by what?

A. By connective tissues.

Q. And this cirrhosis is an inflammation of those tissues, is it?

A. An inflammation of that tissue.

Q. What is the effect upon the liver?

A. The primary effect is an enlargement and the secondary effect is cirrhosis and the induration of the liver.

Q. Hardening of the liver?

A. Yes, sir; and contraction.

Q. Hardening of the liver?

A. Yes, sir; and contraction.

Q. Is there any common every-day term that is used to signify cirrhosis of the liver?

A. It is called hobnail liver and gin-drinker's liver.

Q. What is the probable duration of this disease and how does it culminate?

A. The probable duration is about a year.

Q. How does it culminate?

A. In death.

Q. What proportion of the cases of cirrhosis of the liver are due to the excessive use of alcoholic liquor—that is, within your experience?

315 A. I have never known of but one case of cirrhosis of the liver but what I have reason to attribute to the use of alcohol.

Q. What is hematemesis?

A. Vomiting of blood.

Q. Is there any connection between hematemesis and the excessive use of alcoholic liquor; and, if so, what?

A. It is not an infrequent symptom in cirrhosis of the liver.

Q. Hematemesis is not?

A. Hematemesis is not an infrequent symptom of cirrhosis of the liver.

Q. I ask you now is there any connection between hematemesis and the excessive use of alcoholic liquor.

A. Not necessarily.

Q. The effect of taking liquor into the stomach is not to produce hematemesis.

A. It might do so.

Q. In what way?

A. In congestion of the stomach.

Q. It is a destruction of what?

A. Of the lining membrane of the stomach—the mucous membrane of the stomach.

Q. And gradually what is its effect upon the veins and blood vessels of the stomach?

A. It produces erosion of the vessels of the stomach, and hematemesis occurs from that—the pouring of blood into the stomach and the vomiting.

Q. It destroys what?

A. The mucous membrane of the stomach.

316 Q. And permits the flow of blood into the stomach?

A. Yes, sir.

Q. From which it is vomited?

A. Yes, sir.

Q. Is there any connection between the delirium tremens and the excessive use of alchohol, and what proportion of cases of delirium tremens is produced by such excessive use?

A. About one hundred per cent.

Q. That is, every case?

A. Yes, sir.

Q. Have you ever seen a case of true delirium tremens that was not produced by the use of alchohol?

A. I have not.

Q. Describe the symptoms usually attending delirium tremens. What are the premonitory symptoms?

A. Usually a restlessness; acceleration of the pulse. One of the first symptoms is restlessness, nervousness, loss of appetite, sleeplessness.

Q. How about the spirits?
A. At first depressed.
Q. For how long a period of time?
A. No definite period; it might be for a shorter or longer period; for a few hours or two or three days, and finally a hallucination of sight; the seeing of disagreeable objects, usually objects of terror.
Q. And as to hearing?
A. In some cases the hearing is more acute. The delusions are usually those of sight rather than hallucinations of hearing.
317 Q. And as to listening and watching?
A. Watching for objects. I don't know that they listen to objects.
Q. But about sight?
A. Yes, sir; they usually see objects of terror.
Q. Is a long-continued excessive use of alcoholic liquors necessary to bring on delirium tremens or might it be brought on by a single excessive indulgence, say, for a week?
A. Yes; it might be. A long-continued use of alchohol is not necessary to produce delirium tremens.
Q. What is the effect of the excessive use of alcoholic liquors with reference to the impairment of health?
A. The health is impaired by the excessive use of alcohol.

By stipulation between counsel the following testimony of Dr. Ward, taken at the last trial, was read with the same effect as if given on defendant's behalf on the present trial, and with the understanding that Dr. Ward should present himself thereafter for a further examination by either party if desired:

Q. Suppose the case of a man using alcoholic stimulants to the extent of three or four drinks daily, and goes to Alexandria Bay in midsummer, drinks alcoholic liquors occasionally before breakfast, goes upon the river with his boatman from about 8 o'clock in the morning until three to six o'clock in the afternoon, and consumes during that time from what is commonly known as a pint bottle to a
318 quart bottle of alcoholic liquor, and after his return drinks about once an hour in the course of the evening, state whether, in your opinion, the excessive use, such as described, continued from ten to twelve days, would or would not impair his health.
A. It would impair his health without a doubt.
Q. Supposing the same case, but in addition that said person ordered and had sent to his room, near the expiration of said two weeks, two bottles of liquor—one of gin and the other unknown as to the particular kind—and during that afternoon and night drank them both, state what the effect of the use of alcoholic liquor as above stated would be with respect to the impairment of his health.
A. I would imagine anybody drinking that quantity of liquor would impair his health seriously.
Q. And permanently?
A. Probably permanently.
Q. Supposing the same case, and that the following morning he was found in bed, had spasms, and later complained of smoke being

in the room and the air being full of pitch and pitch upon his fingers, which he attempted to remove; complained of a heavy tube being upon the bed, which he wished to have removed; complained of stockings being on that reached above his knees and of his having boots on, there being none of these things; was nervous and excitable and had tremors; occasionally asked for liquor, and requested to be permitted to go to the bar for it, and required to be pacified and restrained, state, if you are able, whether said person was suffering from any disease; and, if so, what disease and to what you attribute it.

319 A. A person answering to these conditions, I should say unhesitatingly, was suffering from alcoholism or delirium tremens.

Q. Taking the same case as to the facts which have been stated, and supposing there was evidence of hematemesis having occurred during the night, to what, in your opinion, was such hematemesis due?

A. That is a difficult question to answer, because hematemesis may be caused by various causes; may arise from various causes.

Q. I am simply asking you to base your opinion upon the facts which have been set out. State what, in your opinion.

A. It might be induced by the congestion of the blood vessels of the stomach, due to the excessive amount of alcohol taken. That would produce it; that would be a cause for it.

Q. And so produce what would be its effect with respect to the impairment of health?

A. It would very decidedly impair the health.

Q. Supposing the case of a man who had not used alcoholic liquor excessively or in such a degree as to impair his health, but during a single afternoon and night drank two quart bottles of alcoholic liquor, which was followed by hematemesis, what, in your opinion, would be the effect of such use of alcoholic liquor with respect to the impairment of health?

A. A man could not take that amount of alcohol in that time without impairing his health.

320 Q. Supposing the same case as to the facts, but in addition the facts as to the smoke and pitch, the heavy tube, and the nervousness, excitement, and tremors which have been stated, what, in your opinion, was the disease with which such person was affected, and to what was it due?

A. I should say he was affected with acute alcoholism or delirium tremens, and due to the use, the excessive use, of alcohol.

Q. Supposing the same case as to the facts, followed up by the death of said person within four days, what, in your opinion, was the cause of the death of such person?

A. It was due to the effect of alcohol—the effect of alcohol upon the brain—producing acute alcoholism or delirium tremens.

Q. Is there any other cause to which the death of said person, assuming the facts above stated to be true, could, in your opinion, be attributed?

A. No; if these facts are true there is no other cause.

Dr. W. W. L. PHILLIPS, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. STRONG:

Q. What is your profession?
A. A practicing physician and surgeon.
Q. Where do you live and practice?
A. In Trenton.
Q. How long have you been in practice?
A. Upward of 30 years.
Q. Are you a graduate of any medical college?
321 A. Yes, sir.
Q. Which?
A. "The Jefferson Medical College, of Philadelphia."
Q. Any college?
A. "Princeton."
Q. Do you consider yourself qualified to express opinions upon the effect of the use of alcoholic liquor upon the human system?
A. Yes, sir.
Q. Have you seen and treated cases of excessive alcoholism both where delirium tremens did and where it did not occur?
A. I have.
Q. What are the most prominent diseases arising from the excessive use of alcoholic liquors other than delirium tremens?
A. Cirrhosis of the liver, certain affections of the brain, troubles of the stomach, indigestion, &c.
Q. Please explain what you mean by cirrhosis of the liver, and the probable duration of the disease, and how it usually culminates.
A. Cirrhosis of the liver usually arises from congestion of the liver, which is frequently produced by liquor; that gives rise to an increased flow of blood to the liver, which increases what is called the connective tissues between the lobules of the liver. In the earlier stages of cirrhosis there is some degree of enlargement; later
322 there is a degree of contraction in the new growth or additional tissue, which contracts the liver and produces the appearance of hobnail or that irregular surface of the liver which is known as the gin-drinker's lever.
Q. That is another term for cirrhosis of the liver?
A. Yes, sir.
Q. And the probable duration of this disease?
A. It is of very considerable duration. It is hard to say. It commences gradually and is of very considerable continuance.
Q. How does it usually terminate?
A. It culminates frequently in dropsy—death from dropsy; abdominal dropsy particularly. Oftentimes by vomiting of blood from the stomach in its later stages.
Q. And its result is what?
A. Death.
Q. What proportion of cases of cirrhosis of the liver are due to the use of alcoholic liquors?

A. A large proportion, if not all.

Q. Is there any connection between hematemesis and the excessive use of alcoholic liquors; and, if so, what?

A. Yes; just as I have described. In case of cirrhosis there is very liable to be hemorrhage from the stomach.

Q. Produced by what?

A. Well, by the hardening of the liver interfering with the circulation and thus damming back the circulation upon the stomach.

Q. The action of the alcohol upon the coating of the stomach and the membrane?

323 A. Yes; the action of the alcohol adds to the difficulty and makes it more liable.

Q. Is there any connection between delirium tremens and the excessive use of alcoholic liquor?

A. A very decided connection.

Q. What proportion of the cases of delirium tremens is produced by such excessive use?

A. A very large proportion, if not all.

Q. Please describe the symptoms usually attending delirium tremens.

A. In all cases of one who uses liquor freely and drinks excessively you will find tremulousness, a general tremulousness, and——

Q. What is the mental condition?

A. The mental condition is unsettled, unsteady, one of mania or delirium.

Q. What would you describe it in popular terms; a mania of what?

A. Being wild and incoherent.

Q. Is there any exhibition of fear?

A. Some hallucinations of sight, seeing objects that produce terror; terrifying.

Q. Is a long-continued excessive use of alcoholic liquors necessary to bring on delirium tremens or may it be brought on by a single excessive use?

A. It might be brought on by a short period of excess.

Q. I mean a period of, say, ten days or two weeks.

A. Yes, sir; a week or two of decided excess.

324 Q. That would induce delirium tremens?

A. Yes, sir.

Q. What is the effect of the excessive use of alcoholic liquors with reference to the impairment of health?

A. Its tendency is to impair the health.

Q. Now, suppose the case of a man in the habit of using alcoholic stimulants to the extent of three or four drinks daily——

(The COURT:)

Q. One moment. You say that the excessive use of liquors impairs the health; do you mean the continued use of the excessive use for a short time?

A. The continued use of liquor excessively undoubtedly impairs the health; the continued use for a short time probably must pro-

duce some degree of impairment, which may be in case of short duration scarcely appreciable.

(Further direct:)

Q. But a case such as I am now about to describe. Suppose the case of a man in the habit of using alcoholic stimulants to the extent of from three to four drinks daily, who goes to Alexandria Bay in midsummer, drinks alcoholic liquors occasionally before breakfast, goes upon the river with his boatman from about 8 o'clock in the morning till three to six in the afternoon, and consumes in that time from what is commonly known as a pint bottle to a quart bottle of alcoholic liquor, and after his return drinks about once an hour in the course of the evening, state whether, in your opinion, the effect of such use of alcoholic liquors continued from ten to twelve days would or would not impair his health.

325 A. I should consider that the use of alcoholic liquor must impair the health.

Q. Suppose the same case, but in addition that said person ordered and had sent to his room near the expiration of said two weeks two bottles of liquors, one of gin and the other unknown as to the particular kind, and during that afternoon and evening drank them both, state what the effect of the use of alcoholic liquor as above stated would be with respect to the impairment of his health.

A. The use of liquor in that quantity would be liable to produce death by poison absolutely.

Q. Supposing the same case, and that the following morning he was found in bed, had spasms, and later complained of smoke being in his room and the air being full of pitch and pitch being on his fingers, which he attempted to remove; complained of a heavy tube being upon the bed, which he wished to have removed; complained of stockings being on him reaching above his knees and of having boots on, there being, in fact, none of these things; was nervous and excitable and had tremors; occasionally asked for liquor, and requested to be permitted to go to the bar for it, and required to be pacified and restrained, state, if you are able, whether said person was suffering from any disease; and, if so, what disease and to what you would attribute it.

A. Suffering from the poisonous effects of alcoholic liquor.

Q. What is the name of the disease?

A. You might call it delirium tremens. He manifested the symptoms of delirium tremens.

Q. Taking the same case and supposing that there was evi-

326 dence of hematemesis having occurred during the night, to what, in your opinion, was such hematemesis due, and what would be its effect with respect to the impairment of health?

A. If the hematemesis was large in quantity it would probably be due to the injurious effects of alcohol; if small it might come from the nose or tongue.

Q. Taking about a pint.

A. That would probably be due to the injection of alcohol into the stomach.

Q. Suppose the same case, but in addition the facts in regard to smoke and pitch and the heavy tube and nervousness, excitement, and tremors which have been stated, what, in your opinion, was the disease with which said person was affected and to what was it due?

A. The symptoms were merely evidences of the poisonous effects of the alcohol.

Q. And the disease is what?

A. Alcoholism or delirium tremens.

Q. Upon the facts which have been stated is there any other cause to which the death of said person could, in your opinion, be attributed?

A. I can see none from the facts stated.

Cross-examination (by Mr. LINN):

Q. In answering these hypothetical questions which have been put to you you assume, as a matter of fact, that the statements contained in them are true?

A. Oh, of course.

Q. What hallucinations of sight usually occur in cases of —?

327 A. Serpents, lizards, and such things are frequently supposed to be seen.

Q. Is or is not that the case almost universally?

A. It is the case in a large proportion of cases of delirium tremens.

Q. Do or do not people sometimes have hallucinations in cases of sickness which in some respects resemble delirium tremens without being the result of alcohol at all?

A. They are more apt to have delusions in other sicknesses—in conditions of high fevers, &c. They might have hallucinations also, and do in some instances.

Q. Please explain to the jury the difference between what you call hallucinations and delusions.

A. Hallucination is false perception by the eye or ear; delusion is a false act of the mind—false mental act.

Q. How would you determine whether the symptom was a delusion or a hallucination?

A. That determines itself by the fact as to whether the thing professed to be seen is to be seen or heard.

Q. And that you would call a hallucination?

A. Yes.

Q. Now, what symptom would indicate a mere delusion?

A. Some wrong mental act; some incoherence in reasoning.

Q. You cannot look into a man's mind and see what his mental act is, except so far as it is made manifest by outward exhibition?

A. By his words.

Q. By words?

A. Yes, sir.

328 Q. Or acts. Do physicians or not often prescribe the use of stimulants for pulmonary troubles?

A. Yes; they do.

Q. Are stimulants when so prescribed to be measured or to be given until the effect is felt upon the system?

A. They are rather to be measured or so given that the effect is under the guidance of the physician and not left to the patient *pro re nata.*

Q. Stimulants — are given in such cases for the purpose of producing the desired effect would have to be given to that extent that the patient would feel it, would it not?

A. Yes; in a certain way, but not feel it in the way of any intoxication; not to become intoxicated.

Q. If you were called upon to examine and prescribe for a patient who had vomited blood how would you determine in your own mind what was the cause of that hematemesis?

A. By knowing something of the history of the case, under what circumstances the vomiting took place, what he had been taking previous to it, and make a careful investigation of the case before determining positively.

Q. How would you determine if he had cirrhosis of the liver in case you suspected it?

A. That could be determined by ascertaining his history as to the use of spirituous liquors; determined somewhat by his appearance of skin, eye, and tongue, condition of the stomach, and by percussion of the liver, and determining its size—its enlargement or diminution in size.

Q. If in such a case you learned that the urine was very
329 scanty, or that the kidneys did not apparently act, what effect would that have upon your judgment?

A. Scanty urine in that case might be due to the want of water supplied by the way of the stomach. It might be due to irritation of the kidneys by alcohol passing off somewhat in that direction, because that does produce diseases of the kidneys to some extent.

Q. Does or does not kidney disease exist often until it produces death without any knowledge on the part of the physician or patient?

A. It does and does not. I will say it seldom does. Men are often not in good health who do not take the proper means of finding out what ails them, and hence they may die of kidney trouble without knowing it or its being known until they die; but a man who is not in proper health, has kidney trouble, and goes to the proper physician, he would have his case ascertained.

Q. How would he ascertain his case?

A. By proper examination of the urine, chemical and microscopical examinations, which are made daily.

Q. Could a physician tell whether he had this insidious kidney disease without examination of the urine?

A. Not positively.

Q. Could a physician tell whether a man had cirrhosis of the liver positively without an autopsy?

A. Yes.

Q. Could you tell that?

A. Yes, sir.

Q. How?

330 A. By a history of the case, and in its advanced stages of development it could be told. In its earlier stages there might be a question of doubt.

Q. What would be the indications of it in its advanced stages?

A. Loss in size of the liver, retraction of the liver up under the ribs, which could be ascertained by careful percussion. The size could be pretty accurately ascertained. Then there would be other symptoms, probably jaundice, the color of the skin, the white of the eye, and the condition of the stomach as to the performance of its functions, and the condition of the kidneys, investigation of the urine, that would be necessary in the determination of it.

Q. Without any of these symptoms and with only the one symptom which sometimes indicates cirrhosis of the liver—I mean hematemesis—would you pronounce it a case of cirrhosis simply from the knowledge that there was hematemesis?

A. No, sir; I would not be ready, if I were called upon in that case, to pronounce it cirrhosis of the liver until I investigated it very carefully.

Q. Hematemesis may come from what causes?

A. Cancer of the stomach, ulcer of the stomach. In any given case those causes can generally be excluded, however, if they don't exist.

Q. Does sun-stroke sometimes occasion vomiting?

A. Yes, if the stomach happens to be full at the time of

331 occurrence it will.

Q. Might or might not excessive vomiting cause a latent ulcer in the stomach to discharge and bleeding to follow?

A. If there was a latent ulcer in the stomach of course a severe act of vomiting might rupture a vessel that lay across the ulcer and so start the blood.

Q. If the veins of the stomach were engorged from any cause, aside from the use of alcoholic stimulants, might or might not excessive vomiting cause them to discharge blood?

A. It might, of course.

Q. In a case of alcoholism or delirium tremens is it usual for the patient to call for liquor, or does he not usually try to conceal that he wants liquor?

A. I don't think that he tries to conceal it ordinarily; he is very apt to insist upon having it.

Q. That is your experience?

A. Yes, sir.

Q. How with regard to his eating; does he want his food in such cases?

A. There is rather a loss of appetite, and yet they will take food or attempt to take food, because they feel the need of it—willing to take almost anything.

Q. Ordinarily, does a patient call for his food in delirium tremens?

A. I can scarcely say as to that.

Q. How is it with regard to sleeplessness; does the patient while suffering from delirium tremens sleep at all?

A. Oh, yes, they sleep, but are not apt to sleep well; some-
332 times they go two, three, or four days without sleep, and yet they will often sleep.

Q. And if the patient has a quiet, peaceful sleep, does it not usually terminate the delirium tremens and the patient recover?

A. Sometimes it does and other times it does not.

Q. What is the ordinary result of such a case if you can't induce sleep?

A. Where there has been a period of protracted wakefulness, if you can induce six or seven hours of comfortable sleep you can consider your case pretty safe to recover.

Q. In a case of delirium tremens how is the pulse of the patient ordinarily?

A. The pulse is weak and rapid.

Q. What is his temperature?

A. His temperature, under conditions of excitement, is increased; sometimes when there had been a long period of wakefulness and the patient is in a state of depression the temperature may even become subnormal.

Q. Are there indications of fever?

A. In a period of excitement there are indications of fever.

Q. Does he perspire?

A. Yes, sir.

Q. He sometimes perspires?

A. Yes, sir.

Q. What is the cause of the feverish excitement and the perspiration?

A. The cause of the perspiration is due to the over-excite-
333 ment, the increased amount of heat, and the perspiration is really a cooling process; nature's plan for cooling a man off a little.

(By Mr. PARKER:)

Q. You speak of hematemesis. Do you use it as a synonym for bleeding?

A. Vomiting of blood from the stomach.

Q. I want to ask you about one or two authorities. You are acquainted with "Reynolds' Practice of Medicine?"

A. Yes, sir.

Q. And with "Loomis' Practice of Medicine?"

A. Yes, sir.

Q. They are authoritative books?

A. Yes, sir.

Redirect:

Q. Speaking of hallucination of sight, I have mentioned to you the pitch and smoke, the tube lying across the bed, the feeling that there were stockings and boots on; those you would describe as hallucinations of what?

A. Of sight, and feeling and smell.

Q. What have you to say about those as accompaniments of symptoms of delirium tremens?

A. They are amongst the accompaniments of delirium tremens.

Q. Now, as to the treatment of delirium tremens, is it not the effort of the physician who treats a case of that kind to produce sleep?

A. Yes, sir.

Q. By the administration of sedatives?

A. Yes.

(By Mr. PARKER:)

334 Q. How can you tell without seeing the patient whether a hallucination as to the weight of something on him is at all a hallucination of sight?

A. I can't tell; my opinion is based upon the question as put.

Q. Then you could not without seeing the patient do so?

A. It depends upon whether the conditions stated to me were correct.

Q. That being so with reference to the hallucinations of smoke?

A. Oh, yes.

Q. Could you, without seeing the patient at all, conclude that that had anything to do with hallucination—that there was a smoky atmosphere had anything to do with sight?

A. I could not tell positively without knowing all the conditions, and I could know all the conditions best by seeing the patient.

Q. And you could not know these conditions at all without seeing the patient?

A. Well, if somebody else knew the conditions and presented them to me——

Q. And told you certain facts?

A. Yes, sir.

Q. From which you saw that it was sight that was in trouble—that is so?

A. Yes.

Q. In all cases of delirium tremens—in frequent cases, I will say—is there any feeling on the part of the patient of oppression
335 which makes him think or say that he thinks there is something upon him?

A. That feeling occurs, I know, frequently.

Q. And without any drink about it?

A. Oh, yes; of course.

Q. The man is represented here to have been in bed and yet to have thought that he had long stockings on or boots. Would you think that hallucination a hallucination of sight?

A. Or feeling.

Q. Or feeling—would you not think it was a hallucination of feeling?

A. Probably it was.

(By the COURT:)

Q. Under the circumstances presented to you by Mr. Parker, would that hallucination arise from the same cause as hallucination of sight would arise?
A. Yes, sir.
Q. The same cause?
A. Yes, sir.

(By Mr. PARKER:)

Q. Is it not a rule and haven't you stated that the hallucinations that characterize delirium tremens are hallucinations of sight?
A. I said hallucinations of sight, false perception of the senses.
Q. I don't think you used that latter phrase.
A. I beg your pardon, I think I remember it.
Q. You may have said it; I got the idea from you as well as the other physician that it was entirely the sight that was in a
336 state of hallucination. You have defined delusions and hallucinations; after all hallucination is nothing but one kind of delusion?
A. I suppose so.
Q. There is no contrast between the two? Delusion might have to do with a number of things?
A. Yes.
Q. Well, again, you said, talking about hallucination and delusion, that it was one or the other of them. I think delusion, you said, was a fault of the mental faculties. Both are, are they not? It is the brain?
A. Yes.

(By Governor BEDLE:)

Q. A man under delirium tremens, technically speaking now, might he have delusion or hallucination, or both?
A. He might have both, sir.
Q. That is all.

Defendant rests, with the privilege of recalling Dr. Ward.

LEWIS A. HECK, sworn on the part of the plaintiff in rebuttal, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you live?
A. 489 Communipaw Ave., Jersey City.
Q. What is your business?
A. Assistant undertaker to William A. Speer.
Q. How long have you been engaged with him?
A. About 13 years.
Q. Did you know William A. Davy in his lifetime?
A. By sight.
Q. Do you recollect when he died?
337 A. By referring to the books I can tell.

Q. About what time?
A. In August, 1881.
Q. Where was his body received, if at all?
A. His body was received at the Grand Central depot.
Q. By whom?
A. By me.
Q. What did you do with it?
A. I brought it to his residence, on Montgomery street, Jersey City.
Q. What did you do then?
A. Placed the body on ice.
Q. In what condition was it when it came to you; was it dressed?
A. It had a suit of underclothes on.
Q. What kind of underclothes?
A. What do you mean?
Q. What were they?
A. An ordinary suit of underclothes that it is customary to wear. It consisted of a shirt, drawers, and stockings.
Q. White or black?
A. White.

Cross-examination by Mr. STRONG:

Q. You didn't testify on the former trial of this case?
A. No, sir.
Q. When were you first spoken to about the case?
A. One day last week, I think.
Q. By whom?
338 A. By my employer, Mr. Speer.
Q. Is that the first time when you first had occasion to recall these facts which you have now testified to?
A. He asked me if I remembered the case of Mr. Davy, and I told him I did.
Q. Was that the first time that you had occasion to recall them?
A. That is the first time that he spoke to me about it.
Q. When was the first time since the receipt of Mr. Davy's body by you and its interment that you had occasion to recall these facts to your mind?
A. One day last week.
Q. And you received the body when?
A. When he died; shortly afterwards, a few days.
Q. That was in August, 1881?
A. Yes, sir.
Q. So that between August, 1881, and one day last week—that is, in March, 1890—you had no occasion to recall these facts to your mind?
A. No, sir.
Q. Have you interred a great many bodies since?
A. Quite a number.
Q. A good many every year?
A. Yes, sir.
Q. Do you make any note in your book or any memorandum of what dead bodies have on them when you receive them?

A. Those that come in the morgue which is connected with the establishment, a memorandum is made of those.

Q. Mr. Davy didn't come that way?

A. I know he didn't. You asked me whether we made a
339 memorandum.

Q. I ask you whether Mr. Davy came that way.

A. No, sir.

Q. So you made no memorandum as to what he had on?

A. No, sir.

Q. Can you specify what the different dead bodies had on when you received them; that you have received during these nine years?

A. If there had been any particular surroundings to the case I might.

Q. Can you name any case which happened in 1881 that you are able to specify and tell what any single body had on that didn't come through the morgue?

A. Yes, sir.

Q. That you received in 1881 beside William A. Davy?

A. No; I won't say in that year.

WILLIAM H. SPEER, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you reside?

A. My place of business is 489 Communipaw Ave., Jersey City.

Q. What is your business?

A. Undertaker.

Q. Did you know William A. Davy in his lifetime?

A. Yes, sir; a great many years.

Q. Did you know him well?

A. Yes, sir.

Q. Did you ever see him intoxicated?

340 A. No, sir.

Q. Did you ever see him drink?

A. No, sir; I used to meet him on the road two or three times a week.

Q. Do you recollect when he died?

A. Yes, sir.

Q. Where were you at the time of his death?

A. I was in Saratoga at the time he died, and my assistant telegraphed me, and I came immediately on.

Q. Who was your assistant?

A. Lewis A. Heck.

Q. The person who has just been sworn?

A. Yes, sir.

Q. Did you see the body after you came on?

A. Yes, sir.

Q. And took charge of it?

A. Yes, sir.

Q. Was the body embalmed?

A. No, sir.

Q. How are bodies embalmed?

A. The only true way of embalming a body is arterially, taking up the femoral of bracket arteries.

Q. Did you see what dress he had on when he came?

A. I saw the dress that he had on when he came out of the ice-box, which was the same which he had on when he came in.

Q. What was it?

A. Gauze undershirt, drawers, and socks. I say gauze; a very thin material, I mean.

341 Cross-examination by Gov. BEDLE:

Q. You used to meet Mr. Davy on the road two or three times a week. On what road?

A. The road leading from Jersey City to Bergen Point.

Q. That was known generally as the road?

A. That was known as the only driving road in Jersey City.

Q. And Mr. Davy had a horse and buggy?

A. Yes, sir; a buggy wagon. Many times he had his wife with him and many times his little boy.

Q. You heard my question. He had a horse and buggy?

A. Yes, sir.

Q. Did I say anything about this wife and boy?

A. No, sir.

Q. Why did you mention it, then?

A. I thought it was progressing matters.

Q. Is that the road to Mike Smith's?

A. It is on the way to Bergen Point, and the only road we have.

Q. Is that the road to Mike Smith's?

A. I don't know where Mike Smith's was.

Q. Don't you remember Mike Smith?

A. I know one man named Smith at Bergen Point; he used to be a clerk to the board of aldermen of Bayonne.

Q. Wasn't there a tavern on what you call the road kept by a man named Mike Smith?

A. There were several taverns in that direction. I haven't visited any of them, so I could not say accurately.

Q. How many, about?

342 A. I suppose every other corner had a gin-mill.

Q. That is a road on which there is not a gin-mill on every other corner, is it not?

A. About that time there were not so many as there is now.

Q. I want to get it more accurate; you know that road of which you speak has not a gin-mill on every other corner, and it is a road through the country largely.

A. I believe I can count at the present time——

Q. I am talking of 1881 and back of that.

A. There were not so many of them then.

Q. How old are you?

A. Fifty-two.

Q. And don't know where Mike Smith's is or was?

A. I never was in the habit of frequenting those places, and therefore it is hard for me to recollect.

Q. You might just answer whether you recollect it or not.

A. There was a man in Greenville by the name of Smith.

Q. And had a tavern?

A. I think so.

Q. On the line of the road you spoke of?

A. No, sir; not on the line of this road; the road I used to meet Mr. Davy on was Ocean avenue at that time.

Q. How many times a week?

A. Oh, sometimes two or three times; he would be out driving, and so would I.

Q. Now, Mr. Speer, you haven't any record of the clothes that were upon the body of Mr. Davy?

A. Yes, sir; my recollection.

Q. A record, I said.

343 A. No written record.

Q. When were you first spoken to about this?

A. About which?

Q. I am talking about this testimony you are giving now.

A. Mr. Van Horn called on me on Saturday last——

Q. I ask you when.

A. I am coming to it. On Saturday last and wished to know whether I would testify in the case of Mrs. Davy if I were called some day during this week at Trenton. I told him I would. Therefore I hunted up the book to see when the date of death was.

Q. Is Mr. Van Horn here?

A. No, sir; I don't think he is.

Q. Just look and see.

A. Mr. John Van Horn.

Q. You see a gentleman by the name of Van Horn here?

A. Yes, sir.

Q. Is not that John?

A. No, sir; that is Abram Van Horn.

Q. He is a relative?

A. I think he is a cousin.

Q. Your attention has not been called to this matter from the time you buried Mr. Davy until Mr. Van Horn spoke to you?

A. No, sir.

Q. How many people do you bury in a year?

A. I have buried as high as 1,000; of late years I have buried all the way from 300 to 500 a year. I am the only morgue

344 keeper in Hudson county, and of course I include these cases in it.

Q. You used the expression when you were examined, a gauze undershirt, and afterwards you said it was very thin material.

A. Yes, sir.

Q. You mean to be understood that it was either gauze or very thin material?

A. It is thin goods.

Q. What kind of goods was it?
A. About the same as worn in summer time?
Q. Light or dark?
A. Light.
Q. You would not say white?
A. Yes, sir; white; I would call it cream tint.
Q. You say he had drawers on?
A. Yes, sir.
Q. Drawers or pants?
A. No, sir; not pants.
Q. Do you recollect the color of the drawers?
A. The same.
Q. Light or white?
A. Light.
Q. And the socks, do you recollect those?
A. Light.
Q. Fancy socks or white?
A. Well, white; about the same color all through.
Q. Now, you think you have fixed in your mind the color of the socks and the color of the drawers and the color of the
345 undershirt, and that it was drawers?
A. Yes, sir.
Q. And you have no memorandum of it?
A. No, sir.
Q. And of the people you buried in 1881 do you recollect how any of the rest were clothed when you took charge of them?
A. Yes, sir; I can go back 20-odd years.
Q. And tell each corpse?
A. Yes, sir; not every one.
Q. Most of them?
A. Yes, sir; a great many of them.
Q. You have a faculty that way?
A. If my recollection is called to any particular person I will bring my memory to bear on that subject.
Q. Now, you say the body was not embalmed?
A. No, sir.
Q. You mean by that that it was not embalmed in the regular or scientific way that is understood by embalming?
A. Yes, sir.
Q. You can't say that fluid had not been injected into the body?
A. There was no fluid injected into that body unless it was done through the mouth, by trocar.
Q. You don't mean to say that was not done?
A. No, sir.
Q. By what?
A. By trocar, which is a hollow instrument used by country undertakers who don't understand how to take up the artery.
346 Q. Do you embalm yourself?
A. Yes, sir.
Q. And according to your mode, that body was not embalmed?
A. No, sir.

Q. Did you take off the undershirt or drawers off that body?
A. I helped to do it and was present at that time.
Q. Who helped you?
A. Mr. Heck, my assistant, and Mr. Frank Newkirk, another assistant.

(By Mr. PARKER:)

Q. Was he buried in those garments?
A. No, sir; these garments were wet when they came off, and we replaced them with dry ones, and then dressed him for the casket.
Q. How was he dressed when he was buried?
A. In a suit of clothes.
Q. Did you put them on?
A. Yes, sir.

(By the COURT:)

Q. Do I understand you as saying that there had been an attempt of any sort made to inject liquid into that body?
A. There had not been.
Q. And there was nothing about the body itself that would lead you to suppose that some clumsy attempt had been made by some country undertaker?
A. There was not.

(By Governor BEDLE:)

Q. You recollect of looking to see if that was the case or not?
A. Yes, sir; we do that in almost every foreign case that
347 comes from a distance—dying away.
Q. Do you recollect of looking to see whether that was so?
A. Yes, sir.
Q. What would excite your suspicion to see whether the body was embalmed or not?
A. We always do it—in fact, my man looked when it arrived.
Q. How do you know he looked?
A. He told me so.
Q. You are not swearing for him. Just give us your own mind now and let him take care of himself. It is quite a common thing for bodies to come in that way, either embalmed or with some assistance of fluids in some way, with imperfect skill, is it not?
A. Just put that question again.
Q. Question read.
A. Yes, sir.
Q. Is there anything else you want to say in this case?
A. I want to explain to you why I know this.
Q. I do not ask for that; if you are particularly desirous to do it we will allow you.
A. No.

(By Mr. PARKER:)

Q. You may explain to us.
A. Mr. Heck and myself have a natural desire to see how other

undertakers perform on these bodies that reach us, that die at a distance. We have received bodies from California; for instance, Ex-Chancellor Zabriskie. I received that body, and although it was supposed to be embalmed arterially, yet it did not keep, and
348 of course it is for us to know how this is done by other undertakers.

Q. And that is the reason you looked to see whether anything had been done?

A. Yes, sir.

Q. And you saw no signs of it?

A. No, sir; yet the body was keeping very well.

(By Governor BEDLE:)

Q. You found the body in good condition?

A. Yes, sir.

Q. On what day did it reach Jersey City?

A. Of the week?

Q. Well, what day? You may answer it either way.

A. I could not tell you that, sir.

Q. Why not?

A. Can you tell me what date that death was?

Q. I ask you.

A. I think the date of death was about the 7th of August.

Q. What time did it reach you?

A. On the 8th, I think.

Q. How confident are you that it was at that time?

A. I received a telegram on the day that he died, and I came home the next day and found the body had arrived.

Q. If he died on the 7th and reached you on the 8th, you would naturally expect the body to be in a fair condition?

A. That altogether depends upon what disease he died of. There was no indication of any liver trouble, in my estimation.

Q. Are you a doctor?

A. No, sir; but I look at those things as they come in.

Q. If he died on the 6th and reached you on the 8th, in the
349 month of August, the body would naturally have shown some signs of decomposition if it hadn't been cared for carefully, would it not?

A. Not necessarily. Some bodies of consumption *and* keep three days without any care whatever.

Q. In the month of August?

A. Yes, sir; it depends upon the state that the body is in. If it is wasted it will keep much better than if it is stout.

Dr. WALTER RAE, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you reside?

A. Jersey City.

Q. You are a practicing physician?

A. Yes, sir.
Q. Of how long standing?
A. 14 years.
Q. Did you know William A. Davy in his lifetime?
A. Yes, sir.
Q. Were you with him at the time he died?
A. No, sir.
Q. What time did you leave Alexandria Bay?
A. Three o'clock in the afternoon?
Q. What time did you arrive there?
A. I had arrived there the previous day, at noon time.
Q. Could you tell what was the matter with him?
A. No, sir.

Q. You had a consultation with Dr. Watson there?

350 A. Yes, sir.

Q. In making out the certificate of the cause of his death, at the instance of the company——

Defendant's counsel objected to the words "at the instance of the company."

Q. Did you make the certificate as to the cause of his death?
A. Yes, sir.
Q. Who called upon you to obtain that certificate?
A. I can't say positively.
Q. Have you any recollection at all whether it was Mr. Van Horn, or Mr. Frank Davy, or Edwin Davy.
A. I have no positive recollection about it.
Q. One question that was put to you in that certificate was, "What was the direct cause of his death?" Your answer was, "Exhaustion from hematemesis." Was that what you understood to be the cause of his death?
A. Yes, sir.

(By the COURT:)

Q. You say you understood that to be the cause of his death. Do you mean to say that that was your opinion as to the cause of his death, or somebody else told you?
A. I think that was my opinion.

(Further direct:)

Q. The next question you were asked was, "What was the indirect cause of his death?" and your answer was, "Exposure to the sun and cirrhosis of the liver." Did you know that he had been exposed to the sun, or did you know that he had cirrhosis of the liver?
A. I didn't see him exposed to the sun. I was told that he had been exposed to the sun.

351 Defendant's counsel moved to overrule the answer on the ground that it is hearsay.

Motion denied. Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

Q. Did you know that he had cirrhosis of the liver?

A. No, sir.

Q. Was there any autopsy or post-mortem examination?

A. No, sir.

Q. How only or what would be the best way of determining whether he had cirrhosis of the liver?

A. By an autopsy.

Q. Why did you give that certificate stating the indirect cause of death was exposure to the sun and cirrhosis of the liver?

(Gov. BEDLE:) We would like to interpose an objection here to that question. It is not dealing with the circumstances; it is dealing with the conditions of his mind more particularly. It is not an explanation of the circumstances under which it was given; it is framed in such a way as to deal with his motives.

Mr. LINN: The object is to know what reasons he had.

The COURT: You do not put it in to contradict his certificate?

Mr. LINN: No, sir.

Question admitted. Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

352 A. Because hemorrhage of the stomach might be produced by either one of those.

Q. And that hemorrhage of the stomach is what has been called hematemesis?

A. Yes, sir.

Q. Do you know the cause of the hematemesis?

A. No, sir; not positively.

Q. Another question put to you was, "Was his last illness occasioned or had his general health been impaired by any pernicious habit?" Your answer was, "He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health." Did you say that you could say certainly that they impaired his health?

A. Not positively.

Q. Were you ever called upon to see Mr. Davy when he had a hemorrhage prior to this time at Alexandria Bay?

A. I think not.

Q. Reflect a moment; don't you recollect? Were you ever called upon to see him at Jersey City when he had a hemorrhage prior to the time when he was at Alexandria Bay?

A. I would not swear. I have no recollection of it just at present.

Q. Let me refresh your memory by reading from your testimony at the last trial. The question was put to you then, "Were you ever called to see him at any time when he had a hemorrhage prior to this, or vomiting of blood prior to this time at Alexandria Bay?

Ans. Yes, sir. Ques. What year? Ans. I could not tell you what year. Ques. Prior to that time? Ans. Yes, sir. Ques. What
353 did you see him for—hemorrhage, was it not? Ans. Yes, sir. Ques. How much blood did he lose then? Ans. I think the bleeding was stopped when I got there." Now, do you recollect anything about it or has it gone out of your mind?

A. It has gone out of my mind.

Q. All right, if you do not recollect.

A. If I said so it must be so. I have no recollection of it now.

Cross-examination by Mr. STRONG:

Q. What was his condition when you arrived at Alexandria Bay?

A. He was, in my opinion, in a dying condition.

Q. You arrived at Alexandria Bay what day?

A. I think on the 5th of August.

Q. Was that a Friday?

A. I think it was, sir.

Q. You remained how long?

A. Yes; I got there on Friday and I remained until Saturday afternoon.

Q. Did you leave before or after he died?

A. I left before he died.

Q. At the time you left you saw there was no hope of his recovery?

A. Yes, sir.

Q. And there was no use of your staying there?

A. No, sir.

Q. Did you see him eat anything while you were there?

A. I don't recollect it.

Q. Did you see anything brought to him to eat?

A. I remember some milk being brought to him.

354 Q. Did you see anything brought to him to eat?

A. I think not. I could not be positive about that.

Q. How often were you in his room?

A. I was in and out all the time I was there. I could not say how frequently.

Q. A good many times?

A. Probably so.

Q. In the certificate you were asked this question: "Was his last illness occasioned or had his general health been impaired by any pernicious habit?" Your answer was, "He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health." That was true, was it?

A. That I made that statement?

Q. That statement was true, was it not, in your opinion?

A. It says probably. I didn't make any positive statement.

Q. I ask you whether that statement is true in your opinion at that time.

A. I said probably.

Q. You either don't get the drift of my question or else you try to

avoid it. Now, let us get it straight. Was the statement in response to the question which I have just read, "He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health"—was that answer which you gave at that time, in your opinion, true or false?

A. It was true.

Q. Did you know that he had been in the habit of using stimulants?

A. Yes, sir; I did, I suppose.

355 Q. Didn't he tell you that he had?

A. I don't recollect of his telling me.

Q. You only testified a year ago, and let me recall to you this question: "Did you know that he had been in the habit of using stimulants? Yes, sir; he told me." Was that true?

A. If I testified so, it is.

Q. Don't you remember testifying so?

A. That is nine years ago.

Q. I am reading testimony that you gave only a year ago?

A. I said so in the certificate; it must be so.

Q. I ask you, "Did you know that he had been in the habit of using stimulants? Yes, sir; he told me." Don't you recollect the fact that he did tell you that he used stimulants?

A. I have no recollection of testifying so; if I testified so, it is true.

Q. Don't you recollect testifying so a year ago in answer to Mr. Linn's question?

A. I have no recollection of that.

Q. You certified that he was in the habit of using stimulants?

A. Yes, sir.

Q. And that was true?

A. Yes, sir.

Q. And by stimulants you wish us to understand alcoholic liquor?

A. Yes, sir.

Q. And when you say probably they impaired his health

356 that was your opinion at that time?

A. Yes, sir.

Q. You don't deny that it was your judgment that they impaired his health?

A. They mean tobacco and liquor together.

Q. I ask you about stimulants, nothing about tobacco. You don't deny that in your judgment that they impaired his health?

A. I said they probably did.

Q. I don't ask you what you said in your certificate, and if you will pay attention to the question we will get along faster. You don't deny that it is your judgment that they impaired his health, do you?

A. No, sir.

Q. You adhere to the statements that are contained in the certificate?

A. Yes, sir; as far as I know.

Q. You adhere to the statements that you made there in the certificate?

A. Might I be allowed to explain?

Q. Just answer the question. You answered it at two former trials and I want it again. You adhere to the statements that are contained in that certificate?

A. Yes, sir.

Q. Do you know from conversing with Mr. Davy, as a physician, in Jersey City, that he was in the habit of drinking?

A. What do you mean by drinking?

Q. I mean just taking that question—drinking liquor.

357 A. I suppose I knew that he took liquor; I suppose that he did.

Q. Probably through conversing with him?

A. Probably so.

Q. Do you know from his statement to you how many glasses of liquor he was in the habit of taking a day?

A. No; I do not. I don't remember of his telling me as to the number of drinks he took a day.

Q. Didn't you testify in this way on the first trial: "Didn't he say to you that he was in the habit of taking so many glasses of liquor in a day (this was asked by counsel for the defendant), and didn't you mention the number to me this morning? Ans. He consulted me in 1880 for indigestion. Just answer that question. At one time he took three or four drinks a day. He told you that as a physician? I think so. When was that? I think that was in 1881. The year of his death? It might have been the year before; I can't be positive." Didn't you so testify on one of the trials?

A. I probably did.

Q. And that was true?

A. Yes, sir; if I said so it was true, to the best of my recollection.

Q. Do you recollect testifying that way?

A. That testimony was given how many years ago?

Q. Do you recollect testifying that way?

A. I recollect being on the stand, but I don't recollect just what I said; but if I testified that way it was so.

Q. The question is whether now your recollection — re-

358 freshed by what I have read to you from the record of the first trial—whether you do not recollect the fact that you so testified?

A. If it is there I must have testified so.

Q. In the majority of cases of cirrhosis of the liver is it not produced by spirit drinking?

A. A majority of cases; yes, sir.

Q. It is the action of alcohol upon what organ of the body?

A. Upon the liver.

Q. And that is the result of spirit drinking in a great majority of cases?

A. Yes, sir.

Q. Is not hematemesis a symptom of cirrhosis of the liver?
A. Yes, sir.
Q. Would not drinking three or four drinks of alcoholic liquor—brandy—a day steadily and regularly impair a man's health?
A. In some cases it would.
Q. What would be its tendency? Would it have that tendency, or not?
A. That would be the tendency in some persons.
Q. I am talking about the ordinary man—the average man—as we go along every day. Would or would not drinking three or four drinks—ordinary drinks I mean, such as a man ordinarily takes—brandy—a day impair a man's health?
A. It would depend upon the size of the drink.
Q. I say an ordinary drink that a man takes.
A. There is no standard.
Q. What do you consider about the quantity that is ordinarily taken in a drink—about an ounce, is it?
359 A. Probably less than that, I think.
Q. Near an ounce—three-quarters of an ounce?
A. I should say about that. I don't speak from knowledge.
Q. Would not drinking three or four drinks of alcoholic liquor measuring, to be precise, about three-quarters of an ounce, of brandy, a day, steadily and regularly, impair a man's health?
A. In some cases it would and in others I think it would not.
Q. I am talking about the average man. You have testified to this before.
A. I think the tendency would be that way, depending upon the drink.
Q. I am taking drinks of the quantity I specified.
A. I think four drinks a day would have a tendency to affect the stomach.
Q. Three-quarters of an ounce. Would that be a large drink?
A. No, sir; I should think two ounces.
Q. Didn't you testify: "Drinking three or four drinks of alcoholic liquor—brandy—a day, steadily and regularly, impair a man's health. It might. Would it have that tendency? That would be the tendency." Did you not so testify?
A. That would be the tendency in the majority of cases.
Q. And by drinks I am asking you now about drinks to the extent of about three-quarters of an ounce of alcoholic liquor.
A. It would depend whether the man took it upon an empty stomach or after meals. It would depend upon a man's
360 physical and nervous temperament.
Q. Would it not have that tendency?
A. In some cases it certainly would.

Redirect by Mr. PARKER:

Q. I find in this record of the last trial a question by Mr. Strong: "When I questioned you in regard to drinking you understood me to mean an ordinary drink. What do you understand by the drinks

that I refer to? Ans. Anything from a teaspoonful to a quarter of a pint; maybe a drink of water." Did you so answer?

A. I must have if it is so stated there.

Q. And is that true?

A. I don't know that the word drink has any definition as to quantity. I don't understand it so.

Q. "I understand, do I, that you made no diagnosis of this case yourself at Alexandria Bay? Ans. No positive diagnosis. Ques. You certify from what you heard? Ans. Yes, sir. Ques. And because you heard nothing to the contrary? Ans. No, sir." And Governor Bedle is reported to have asked you this question: "You made that certificate upon your professional responsibility after seeking to inform yourself and giving your judgment as an honest, professional man? Ans. Yes, sir." Is that so?

A. Yes, sir.

Q. From whom did you receive information upon which you based that certificate?

361 Defendant's counsel objected to the question on the ground that he assumed that he based it upon information. Question admitted. Exception prayed and allowed and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. I presume from the attendants and from Dr. Watson.

ABRAHAM VAN HORN sworn on the part of the plaintiff in rebuttal.

Direct examination by Mr. LINN:

Q. Where do you reside?

A. 400 Communipaw Ave., Jersey City.

Q. What is your business or occupation?

A. I am a counsellor-at-law of this State.

Q. Were you acquainted with William A. Davy in his lifetime?

A. Yes, sir.

Q. How long had you known him?

A. As long as I can remember.

Q. What were your relations with him?

A. Both of a friendly character and of a business character.

Q. How long were you associated with him?

A. I saw him probably five times a week every week that he was in Jersey City, I should think; I saw him very often.

Q. Where did you see him?

A. He had a habit of stopping in my office as he came downtown to go to New York; I called at his house two or three times a week to see him. I have been out riding with him; almost every week I would go out riding with him.

Q. Did you ever visit Alexandria Bay with him?

A. Yes, sir.

362 Q. How many years were you there as near as you can recollect?

A. I have been at Alexandria Bay with him, I suppose, at least

eight different years, perhaps more.

Q. Who usually accompanied you there?

A. A gentleman by the name of Clark was with us some years; Mr. Van Cleve was with us some years; Lawton was with us some years; I think he was there only once or twice.

Q. After Mr. Davy's marriage was there any other person with him that hadn't been before? Did or did not Mrs. Davy accompany him?

A. After his marriage, yes, sir.

Q. How did you spend your time when you were there?

A. We were out on the water fishing almost every day except Sunday. I don't remember of ever going out of a Sunday. In fact that was very unusual about Alexandria Bay to go out on Sunday.

Q. Did you know this man William White?

A. Yes, sir.

Q. What was he?

A. A boatman.

Q. Did you ever go out with him?

A. Yes, sir.

Q. What was your practice in regard to the use of intoxicating drinks while you were there?

A. We did drink, particularly when we came back from fishing. It was the custom then to go to the bar-room with the boatman, particularly if the day had been a successful one, and treat the boatman, at the same time taking a drink ourselves.

Q. Where did you go to, what place?

363 A. At the hotel.

Q. To any of the islands, at different places?

A. On the island, different-named islands?

Q. Yes.

A. I have been to what is called the Oak Trees; through the false passage through the lake of the islands and on the Canadian shore.

Q. At what place?

A. There were only two places at which there was a house, a little place called Rockport and a place by the name of Senecal, on Grindstone Island.

Q. Were you frequently at those places?

A. No, sir; not frequently.

Q. How, in the middle of the day when you took your lunch with you?

A. On the island—on whatever island might be convenient for lunching we would have a camping ground arranged. The boatman would make a fire and cook the fish that we caught through the morning.

Q. Well, what were his habits? I will ask the question just as I asked it before. What did he do in regard to drinking when you were there? How did he pass his time?

A. He didn't pass it drinking.

Q. Did you ever see him intoxicated?

A. No, sir.

Q. Do you recollect whether he was there in 1879 or do you recollect the time he went up into Connecticut?

A. No, sir.

Q. Were you with him there?

364 A. No, sir; I have never been with him in Connecticut.

Q. Do you know Mr. Van Horn, who prepared these proofs of loss of death of Mr. Davy?

A. My recollection is that I brought them to Dr. Rae.

Q. Where did you get them from?

A. Mr. E. H. Davy gave them to me.

Q. Did Mrs. Davy ever see them? Did she have anything to do with them at all?

A. My recollection is not.

(By Mr. PARKER:)

Q. I want you to try and particularize the years that you were there with him. Were you up there with him in 1879?

A. I was not there in 1876, nor in 1881. Between '76 and '81 I think I was there two years, but I could not pick them out. I was there in '79 myself for a few days.

Q. You can't tell whether he was there?

A. No, sir.

Cross-examination by Mr. STRONG:

Q. Is your recollection as to the frequency with which you saw Mr. Davy better at this trial than it was at the last?

A. I think not.

Q. Would you be absolutely sure that you saw Mr. Davy twice a week?

A. Yes, sir; I would.

Q. Just let me call your attention to this question and answer on page 139: "How often were you in the habit of seeing him? Ans. I should say twice a week, to be absolutely sure; at least twice a week; I think oftener." Do you remember that testimony?

365 A. I do not.

Q. If you did so testify, was it true?

A. Yes, sir; if I did so testify.

Q. Just look at your testimony. You will find it right on that page. Do you recollect it now?

A. No, sir; I read it now.

Q. Do you recall it now of having so testified on the former trial of this case, after looking at the records of this case?

A. Do I remember having stated that?

Q. Yes.

A. No, sir.

Q. Is your memory about that as good as it is about anything else in this case?

A. Yes, sir.

Q. Are you a married man?

A. No, sir.

Q. You don't wish to convey the idea to this jury that you were at Alexandria Bay in 1881?

A. No, sir.

Q. And you don't wish to convey the idea to them that you were there in 1880, do you?

A. I have no desire to convey to them that impression.

Q. You were not there in 1880 or 1881 with Mr. Davy?

A. No, sir; not in 1881.

Q. Nor in 1880?

A. I don't remember about that.

Q. "At what period have you been speaking of now of his
366 life? Ans. 1879, 1878, 1877. I don't think I was with him in '80 or '81 and prior to that time." Do you say that?

The COURT: I think he said that.

Q. You don't think Mrs. Davy saw this proof of death at all?

A. I don't know whether she ever saw them or not.

Q. Did you say on your direct examination that you don't think she saw them?

A. Yes, sir; I mean by that in my presence.

Q. Is your recollection of that as good as anything else in this case?

A. Yes, sir.

Q. About the same in regard to all these facts?

A. I should judge so.

Q. I will hand you the proofs. Tell me if you don't see the signature of Ada Davy and your signature as notary public.

A. Yes, sir.

Q. In view of that, now just tell us whether Mrs. Davy did or did not see these proofs.

A. She saw that paper that you showed me, if that is the proof of the death.

Q. Just look and see whether it is or not.

A. It so says; it says proof of loss.

Q. Well, proof of loss; that is what you put in as proof of death or proof of loss, whichever you choose to call it, to the company?

A. Whatever paper that may be, I signed it.

Q. What do you call it?

A. It is called proof of loss.

Q. That is the paper you put into the company, then, as the proof of loss?

367 A. It is the paper that I took the affidavit on.

Q. As proof of loss?

A. Yes, sir.

Q. And there is no doubt at all, is there, that Mrs. Davy saw that paper?

A. No doubt at all in my mind.

Q. Won't you specify, now, on that paper what parts are in your handwriting and what parts are in the handwriting of Dr. Rae?

A. Shall I read it?

Q. Yes.

A. In my handwriting are the words, "N. J., Hudson, Walter A.,

Jersey City, N. J., physician, 13th August, 1881; Abraham Van Horn, notary public, State of New Jersey."

Q. All the rest is in Dr. Rae's handwriting?

A. Yes, sir.

Redirect:

Q. Do you mean to say that Mrs. Davy saw that certificate which you last had in your hand?

A. No, sir; that is what I mean to say, I don't remember her seeing the last certificate. I suppose that is what you mean by proofs of loss.

Q. She saw the affidavit to which she subscribed?

A. Yes, sir.

Q. Did she see any of the other affidavits to your knowledge?

A. My recollection is she did not; that particular paper to which Mr. Strong referred to is what I mean by that.

368 Recross:

Q. Having admitted that she saw this proof of loss, are you able to state positively from present recollection that she didn't see anything else connected with these papers handed in as constituting the proofs of loss?

A. It is impossible for me to say she didn't see them, Mr. Strong.

JAMES CLARK, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you live?

A. Jersey City.

Q. What is your business?

A. I am in the banking business.

Q. Were you acquainted with William A. Davy in his lifetime?

A. Yes, sir.

Q. How long have you known him?

A. I knew him since our boyhood; twenty years probably.

Q. Did you associate much with him?

A. Yes, sir; I was very intimate with him.

Q. Did you go with him on summer vacations?

A. Yes, sir.

Q. At what place?

A. Well, oftener to Alexandria Bay than anywhere else.

Q. Do you recollect that he went to Connecticut or Massachusetts somewhere?

A. Yes, sir.

369 Q. Do you recollect what year that was?

A. Not positively; it was either 1878 or 1879. There was a circumstance connected with that year that I can't recollect, but it was the time of the big railroad strike throughout the country.

Governor BEDLE: 1877?

A. It was either 1877 or 1878.

(By the COURT:)

Q. The riot at Pittsburgh?
A. Yes.
Q. 1877 that was.
A. That year we went to Connecticut.

(Further direct:)

Q. What was your practice and Mr. Davy's when you were at Alexandria Bay?
A. We went boating and fishing every day except Sundays.
Q. What was your practice with regard to drinking liquor?
A. We drank just as we cared for it.
Q. Did you ever see Mr. Davy intoxicated?
A. No, sir.
Q. Where did you see him in Jersey City?
A. He was a member of a boat club that I also belonged to. He used to visit there very often in summer, and in the winter time I used to see him at his house. I used to meet him crossing the river on the ferry-boat.
Q. Did you know this man William White?
A. Yes, sir.
Q. Were you ever in the boat with him?
A. Yes, sir.
370 Q. I mean when they were together.
A. It is before that that we were together.
Q. How many years were you at Alexandria Bay?
A. Five or six years.
The COURT: Mr. White's testimony was limited to the last ten days.
A. What was that question?
Q. I ask you when you were out with Mr. White and Mr. Davy, these young people together, whether you had a flask of liquor or a bottle of liquor in the boat.
A. Yes, sir.
Q. What was his habit while on the water as to drinking?
A. He drank no oftener than we did. We generally drank together; if he took a drink we did.

Cross-examination (by Mr. STRONG):

Q. You were not with him in 1881?
A. No, sir.
Q. Nor in 1880?
A. I was there in 1880.
Q. Were you in the same boat with him?
A. No; he was in another boat.
Q. When is the last year that you remember that you were in the same boat with him?
A. 1876.
Q. Was he in the habit of drinking at the bar?
A. Yes.

Q. Was he in the habit of drinking out in the boat?
A. Yes, sir.
Q. Was he in the habit of taking a bottle of liquor with him?
371 A. Yes, sir; we always have.
Q. You know that he was a drinker?
A. Yes, sir.
Q. Do you know what he generally drank?
A. What do you mean, in the way of stimulants?
Q. Yes.
A. Brandy and whiskey.
Q. You used to see him treat the boatmen in the evening?
A. Very seldom.

EDWIN FRY, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination (by Mr. LINN):

Q. Where do you reside?
A. At Watertown, New York.
Q. Did you ever live at Alexandria Bay?
A. Yes, sir.
Q. When?
A. In 1881 was my last year there, I think, and I lived there four years previous.
Q. Where was your home then?
A. I was then waiter at the Crossman House.
Q. Where was your position—what place did you occupy?
A. In the dining-room—taking charge of the dining-room.
Q. Did you know William A. Davy?
A. I did, sir.
Q. How long—how many years have you known him?
A. I knew him every year during the time I was there.
Q. You were there in 1881?
A. Yes, sir.
372 Q. That was the summer he died?
A. Yes, sir.
Q. What place did he have at the table?
A. He had a seat at the table. We never shifted the people around; we had room enough to accommodate every one. Sometimes we had to shift them around on account that the dining-room was not big enough to accommodate the people that came down.
Q. Did you ever see Mr. Davy drink?
A. I did not. I was not allowed in the bar.
Q. Did you ever see him intoxicated?
A. I did not.
Q. During the time that he was there in 1881 was he absent from his meals or present?
A. He was always absent at dinner times except Sundays; then he generally was there three times a day, of a Sunday. We won't

call it every day, but it was a miracle to see him there on week days to dinner.

Q. Do you recollect whether or not he was at his meals the last year he was there, in 1881?

A. He was, sir; until about the last two days. He didn't go out fishing as much as he did the previous years.

Q. Did you see him at any time at that period when he was under the influence of liquor at all?

A. I did not, sir.

Q. Do you recollect anything that he was particularly fond of?

A. In the way of eating?

Q. Yes.

373 A. He was fond of broiled mackerel or he was fond of frogs' legs, but he was not much for a lot of meat. What he wanted was a little something of that kind. If he was alive to-day I would know just as well what to get him for breakfast, because I was so well acquainted with him.

Q. Do you recollect whether you took up anything to him while he was sick?

A. The day he died Mrs. Davy sent for me. She said she wanted me, and I went upstairs, and he was up then, sitting in a chair, and I asked him how he felt, and he said that he felt better, but he said he felt hungry. It was late, and I said I think I can get you something. It was not my place, but, on account of being head waiter, I could get it better from the cook than a waiter. I went to the cook and ordered some boiled eggs and some frogs' legs and a cup of tea, but whether he ate it I can't say. I had to prepare my dinner for 12 o'clock and hadn't time to spare, and left the things there.

Q. What was the dinner hour there?

A. Twelve o'clock, and one o'clock Sundays.

Cross-examination (by Mr. STRONG):

Q. What day do you say it was that you had a talk with Mr. Davy and went to get the boiled eggs and a cup of tea?

A. On the 6th of August.

Q. The day he died?

A. Yes, sir; the day he died.

Q. Was he in a dying condition at that time? Did you hear Dr. Rae's testimony?

A. He looked a very sick man.

Q. What was the time when you went into the dining-room

374 for breakfast?

A. When we opened the dining-room?

Q. Yes.

A. About six o'clock.

Q. How long did you remain there?

A. Until the dining-room was closed.

Q. When was that?

A. At nine o'clock.

Q. And then what did you do?

A. I had to see to the dining-room, and see that it was cleared out, and get it ready for dinner.
Q. You stayed there?
A. No, sir; I had to go home to dress.
Q. Of course, head waiters have to dress for dinner?
A. Yes, sir.
Q. You were either dressing for dinner——
A. Or something else.
Q. Or else around the dining-room?
A. No, sir; I didn't make a jail of the dining-room. I didn't live and die there.
Q. That is for the guests?
A. There were no guests there then.
Q. What time did you open the dining-room for dinner?
A. Twelve o'clock, and one on Sundays.
Q. How long did that last?
A. Until three o'clock.
Q. Then at what time did you open for supper?
A. At five o'clock, sir.
Q. Did you have to dress for supper?
A. No, sir; only slight touches.
375 Q. Then how long did you stay open?
A. Until eleven o'clock; perhaps till thirteen.

(By Gov. BEDLE:)

Q. What time was it on the day he died that you had that conversation with him about the frogs' legs?
A. In the morning, I should think, about ten o'clock, as near as I can remember.
Q. What time did he die that day?
A. I think — died—the clerk, Mr. O'Brien——
Q. If you don't know, never mind.
A. I do not, sir, positively. Mr. O'Brien told me that he died at half past three o'clock.
Q. And when you left the room you left him sitting up?
A. Yes, sir.
Q. How long did it take you to get the frogs' legs?
A. It might have been twelve minutes; perhaps thirteen.
Q. Not fourteen?
A. Oh, no.

Redirect:

Q. Do you recollect how long he was there on that occasion; how long he had been there at the house at this last visit?
A. I should not think any more than two or three weeks.
Q. Do you recollect whether he was at his dinners on Sundays?
A. Every Sunday he was there.

FRANK W. DAVEY, recalled, testified as follows:

Direct examination by Mr. LINN:

Q. Do you recollect now when you started from New York to go to Alexandria Bay, the time when your brother died,
376 about what time in the day?

A. About the six o'clock train.

Q. In the evening?

A. Yes, sir.

Q. Where did you go to?

A, I went to the Catskills.

Q. About how long did you remain there? Did you continue in the same train or stop over there? How long did you remain there?

A. Only a short time.

Q. Who did you meet there?

A. Mrs. Davy.

Q. Then what train did you take?

A. I don't know. We went to Hudson from the Catskills and waited there for the express train.

Q. Then you took the express train?

A. Yes, sir.

Q. And got there the next morning?

A. Yes, sir.

Q. In the forenoon some time?

A. Yes, sir.

Q. After you got there and your brother had been removed in the other room, did you see, during any part of the time, any signs of delusions or hallucinations exhibited by him?

A. I did not.

Q. You and Mrs. Davy were there together?

A. Yes, sir.

Q. What room did you occupy during the night?

377 A. An adjoining room.

Q. How long did you remain at Alexandria Bay at that time?

A. From Thursday until Sunday afternoon.

Q. When did your brother die?

A. Saturday afternoon.

Q. About what time?

A. Three thirty.

Q. Were you present at the time of his death?

A. I was not.

Q. Where had you gone?

A. To the boat.

Q. With whom?

A. With Dr. Rae.

Q. Before he died and after he was removed into the room to which he had been taken, did you see Mr. Bruce in the room at any time after he had been removed there?

A. I did not.

Q. Do you know this man who has testified here by the name of Hunt?

A. I do not.

Q. You never had been to Alexandria Bay before?

A. Not before.

Q. And therefore not acquainted with these persons especially?

A. No, sir.

Q. When you left the Bay who accompanied you?

A. Mrs. Davy, Miss Davis, and Mr. Mattoon.

Q. Anybody else?

A. I don't remember anybody else.

378 Q. How many hands or officers were there on the boat? Do you recollect that?

A. I do not.

Q. Was there anybody else in the room—in the cabin—where you were?

A. No, sir; I don't remember of seeing anybody else.

Q. Do you recollect who removed the body from the boat to the cars?

A. The assistant superintendent of the road took charge of the body.

Q. Was there anybody on the boat that helped move the body?

A. I don't believe there was.

Q. Do you recollect when Miss Davis came there?

A. On Saturday morning.

Q. She accompanied you on the boat?

A. Yes, sir.

Q. Now, in Jersey City how near did you live to your brother?

A. The next house.

Q. Do you recollect when he was married?

A. It was five or six years before he was married?

Q. Where did he and his wife live shortly after they were married, before they went to keep house?

A. In the same house with me and my mother.

Q. In what business were you engaged—your brother and yourself?

A. In the manufacture of oakum.

Q. What part of the business did he have to attend to?

A. Buying and selling of goods; the financial part of the business also.

379 Q. Where was your office?

A. New York.

Q. Where was your factory?

A. On Jersey City heights.

Q. Do you know what his habits were of going to the office?

A. He came about nine o'clock in the morning, and would return about one or two in the afternoon.

Q. Do you know whether he ever went to the factory up on the hill in Jersey City?

A. Sometimes he went in the morning; occasionally in the afternoon.

Q. Your brother was older than you?
A. Yes, sir.
Q. Did you ever see him drink any liquor?
A. I did not.
Q. Did you ever see him under the influence of liquor—intoxicated?
A. Not to my knowledge.

Cross-examination (by Mr. STRONG):

Q. Did he travel about the country much?
A. Occasionally.
Q. Was that part of his business?
A. Yes, sir.
Q. What points did he travel to?
A. Western cities—Cincinnati, Chicago, St. Louis; sometimes to Boston and other places.
Q. How much of the time would he be gone in these cities?
A. A week and over.
380 Q. He would go off on these trips frequently?
A. I don't know; I think he did.
Q. You know that he did drink alcoholic liquors?
A. I do.
Q. Did you ever see him when you thought that he was under the influence of liquor?
A. I saw him when I supposed he had been drinking.
Q. Did he keep a horse and buggy?
A. He did.
Q. Travel down the road to Bergen Point frequently?
A. Yes.
Q. And stop at Mike Smith's?
A. I don't know.
Q. Is Mike Smith's down on that road?
A. It is.
Q. Did you notice sometimes that he had been drinking in the morning when you saw him?
A. Occasionally.
Q. Could you smell it in the morning on him?
A. Sometimes.
Q. For how long a period have you known this to continue previous to his death?
A. I could not say.
Q. You were asked this question: "How long have you known him to be so in the habit—so accustomed to take alcohol that you could smell it in his breath." You answered: "I don't remember."
Then there is a question in the same connection: "Is it as
381 long as five or six years? Yes, sir." "Did you swear to that at the other trial? Yes, sir; I did." Do you recollect that now?
A. No, sir.
Q. Don't you recollect testifying so at the last trial?
A. I do not.

Q. You testified a year ago?
A. I did.
Q. Then let me refresh your recollection. Here is your testimony, Frank W. Davy. It runs from here, and then comes down to there. Read that last.
A. I don't remember testifying that way.
Q. Is your memory about everything else as to things that transpired nine years ago nearly as it is of things that transpired at the last trial, a year ago?
A. Just about.
Q. You don't mean to say that this that I read to you is not true?
A. I do not.
Q. Do you remember the appearance of the clerks at the hotel when you were there in 1881?
A. I remember Mr. Bruce.
Q. You remember he was there?
A. Yes, sir; I remember he was there.

Redirect:

Q. Do you recollect of your brother spraining his ankle at any time?
A. Yes.
Q. When was that?
A. In the spring 1881.
Q. Do you know where it was that he sprained it?
382 A. In Jersey City.
Q. Do you know whether it was at the factory or not?
A. I believe it was.
Q. Do you know whether he got over that entirely?
A. He did not.
Q. Do you recollect now what his condition of health was—what was his appearance of health at the time he went to Alexandria Bay in 1881?
A. His health, I think, was poor.
Q. Was he fleshy or was he thin and emaciated?
A. Thin.
Q. Was he strong and vigorous apparently or was he feeble apparently?
A. Feeble.
Q. Did he or not continue to attend to his business up to the time he went away?
A. Yes.
Q. On these occasions when he went to Pittsburgh, Cincinnati, or Boston did any one accompany him?
A. His wife when with him.

(By Gov. BEDLE:)

Q. You don't mean to be understood that his wife always went with him?
A. Not always.

Q. You mean to be understood that she went with him sometimes?
A. Yes, sir.
Q. You spoke of living next to your brother. You didn't live directly adjoining?
A. There was about forty feet of ground between the houses.
383 Q. And a building between?
A. Well, a stable; there was no fence.
Q. Where was your part of the business?
A. In New York.
Q. And the business of the road was done by your brother generally?
A. Yes, sir.

HENRY L. DAVIS, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination (by Mr. LINN):

Q. Where do you reside?
A. Oswego, New York.
Q. Are you in any way related to Mrs. Ward?
A. She is my daughter.
Q. Do you recollect when she married Mr. Davy?
A. Yes, sir.
Q. What year?
A. 1876.
Q. Where were they married?
A. In Oswego; in my house.
Q. Had you been acquainted with Mr. Davy before he married your daughter?
A. Yes, sir.
Q. About how long?
A. Four or five years.
Q. Where did you become acquainted with him?
A. In Oswego; in my house.
Q. How often did you see him from the time you first be-
384 came acquainted with him to the time he married your daughter?
A. Four or five times a year, I should judge.
Q. After they were married, how often then were you in the habit of seeing him from that time down to the time of his death?
A. I can't average it, because several years after he was married I saw him occasionally in town, or whenever I went to New York, but afterwards when I went to New York I stopped at his house, so I saw him every day.
Q. When he came to Oswego where did he stop after he was married?
A. At my house.
Q. Do you recollect when he went to Alexandria Bay just prior to his death?
A. Yes, sir.
Q. Where were you staying then?

A. I was in New York at that time—I think I was.
Q. Where did he live then; where was his home?
A. In Jersey City.
Q. Were you at his house at the time he went away; do — recollect how that is?
A. Yes, sir. I was at his house when he started for Alexandria Bay.
Q. During all the time of your acquaintance with him did you see him drink alcoholic stimulants?
A. Yes.
Q. Where did you see him drink?
A. At various places; chiefly evenings down at a restaurant below the house, Muirs'.
385 Q. Were you there with him?
A. Yes, sir.
Q. Did you ever see him under the influence of liquor or intoxicated?
A. Never saw him intoxicated; no, sir.
Q. At the time you went away to go to Alexandria Bay what was the condition of his health as he appeared?
A. Well, he appeared feeble and wanted to go away for the benefit of his health.
Q. Was he bloated or emaciated or thin; do you recollect?
A. He was not in good health.
Q. You don't recollect particularly how he appeared?
A. No, sir.
Q. Do you know whether he ever carried a pistol; and, if so, what kind of a pistol was it?
A. Mr. Davy had a pistol with a pearl handle and a plated barrel, and he once in awhile carried it, as he said, for protection when he took money out to the factory.
Q. Do you know whether he had it at Alexandria Bay at the time of his death—on that last occasion?
A. The pistol was left with me when he went away.
Q. Where?
A. To the best of my memory it was left in the house and put in a bag that hung on the wall where they kept slippers.

Cross-examination by Mr. STRONG:

Q. Did you drink with him down at Mike Smith's?
A. Yes, sir.
Q. That is down at Bergen Point?
386 A. Yes, sir.
Q. On the Bergen Point road?
A. Down at Mike Smith's, wherever that is.
Q. You were not at Alexandria Bay in 1881 when Mr. Davy was there?
A. No, sir.

Mrs. KATE H. DAVIS, sworn in rebuttal on the part of the plaintiff, testifies as follows:

Direct examination by Mr. LINN:

Q. Where do you reside?
A. My home is at Oswego, New York, but I spend the year teaching at East Saginaw, Mich.—that is, ten months in the year.
Q. You haven't been sworn in this case before?
A. No, sir.
Q. Are you in any way related to Miss Ward?
A. Yes, sir; I am her own cousin.
Q. How long has your home been in Oswego?
A. Ever since I was a little child.
Q. Where was Mrs. Ward's home before she was married?
A. At Oswego, same house.
Q. Were you acquainted with Mr. Davy in his lifetime?
A. Yes, sir.
Q. Where did you become acquainted with him?
A. At Oswego.
Q. Do you recollect when he married Mrs. Davy?
A. Yes, sir; I was there; in 1876.
Q. After he married her did you see much of him?
A. Yes, sir; I saw him every summer, I think.
387 Q. Where did you see him particularly?
A. I saw him at his home in Jersey City and at my home in Oswego.
Q. How much time did you usually spend at his home in Jersey City?
A. Sometimes four weeks and at one time four or five months.
Q. Do you recollect when he went to Alexandria Bay, the year that he died?
A. Yes, sir.
Q. Where were you then?
A. I was in Jersey City with them on a visit.
Q. At his house?
A. Yes, sir.
Q. What was the condition of his health when he went away at that time?
A. He appeared to me to be a very sick man.
Q. Just describe his appearance as near as you can.
A. He looked thin in flesh and he walked with a cane and he coughed a great deal.
Q. Did he expectorate any that you saw?
A. I have seen him and have seen it.
Q. When he went to Alexandria Bay at that time did any one accompany him any distance?
A. I did, from Oswego to Jersey City.
Q. Do you recollect when you started from Jersey City—what day of the week?
A. Yes, sir; Wednesday night.
Q. When did you arrive in Oswego?

A. Thursday morning.

388 Q. How long did he remain there before he went to the bay?

A. From Thursday morning until Saturday noon.

Q. During all the time that you knew him did you ever see him drink, and, if so, what, as near as you can tell?

A. Yes, sir; I saw him drink. I saw his wife give him a milk punch once or twice while I was there that last summer; that is the only time there.

Q. Ever elsewhere?

A. Yes, sir; when he was down at the bay, I think they call it Rockport, he gave me a milk punch and his wife a milk punch.

Q. How much time, if any, did you spend at the bay with Mr. and Mrs. Davy?

A. I went by invitation two or three summers on my vacation down with them.

Q. Now, during all this time, did you ever see him drink more than you have just mentioned?

A. That is all, sir, that I recollect.

Q. Did you ever see him intoxicated or under the influence of liquor?

A. Never.

Q. Were you at Alexandria Bay at the time he died?

A. Yes, sir; I was there that Saturday.

Q. What time did you arrive there?

A. Quite early in the morning, when the boat came in.

Q. When you arrived there did you see him after you arrived?

A. After I got to the hotel.

Q. What room was he in?

389 A. They occupied two rooms, an outside room and an inside room; and when I went to the hotel I went with Frank Davy right up to the outside room and he heard me and called me by name and asked me to come into the room.

Q. Did you have any conversation with him there in that room?

A. Yes, sir.

(By Mr. BEDLE:)

Q. Are you speaking of Frank Davy?

Mr. LINN: No, sir; of William A. Davy.

A. Yes, sir; I did have a conversation with him.

Q. He recognized you?

A. Yes, sir; perfectly.

Q. How long did you remain there, Miss Davis?

A. I stayed with him and went down to New York with them on the boat.

Q. You remained there until he died and accompanied them back to Jersey City?

A. Yes, sir.

Q. What time of the day did he die?

A. Quite on to half past three, I should say.

Q. Was there any undertaker or person to take charge of the body at the time he died?

A. There was no one there at the time he died, only his wife and myself.

Q. What did Mrs. Davy do then under the circumstances?

A. She called to me.

Q. She was in the room alone when he died?

A. Yes, sir; the door was open and she was in the room alone.

390 Q. After his death what was done?

A. She called to me and I went in, and we stood looking at him for a few minutes, and she commenced to get him ready; took off some of his clothing and asked me to help her.

Q. Did you furnish any clothing which she put on him?

A. She asked me to go to his trunk and get some things and I did and handed them to her.

Q. What did you get and what did she put on?

A. She put on a suit, or at least there was a flannel shirt I handed her, and a pair of thin flannel drawers and a pair of socks.

Q. Was there anything else put on him before his body was taken away?

A. No, sir; there was nothing else on him.

Q. Did you see at that time or at any time during that day, in the room or about there, this man, William H. Hunt—do you know him?

A. No, sir; I have no recollection of the man or ever seen him.

Q. You didn't know the man?

A. No, sir; I should not know him now. I never saw him.

Q. How was his body taken to Jersey City?

A. It was in an ice box; some kind of a rough-looking box with ice in it.

Q. And by what conveyance?

A. It was taken by boat to Clayton, and there we took a special train to Utica, and from there down on the other train.

391 Q. On what day did you leave the bay?

A. Sunday noon.

Q. Who accompanied you on the boat?

A. Mrs. Davy, Mrs. Frank Davy, and Mr. Mattoon and myself.

Q. Was there anybody else on the boat beside you and the boat hands?

A. I saw no one; no, sir.

Q. What kind of a boat was it?

A. I don't know as I can describe it, only that it was a very small steamer.

Q. A tug-boat?

A. A little, small steamer; a little bit of a one.

Q. Where was the body placed in the boat?

A. It was placed about near us and we were all around it. There was a seat around the side of the boat and the body was placed in this opening, and we were on the outside of it.

Q. Where did the body land—at what place?

A. At Clayton.

Q. Can you recollect how the body was taken then from the boat to the cars?

A. The train hands—there were two or three men—came down from the train and put it on a truck or something with wheels under and carried it up to the train.

Cross-examination by Mr. STRONG:

Q. What two months of the year didn't you spend at East Saginaw?

392 A. During the summer, July and August, I have vacation.

Q. When was it that you spent some months at Mr. Davy's house; what year?

A. It was the year before his death.

Q. I mean at Jersey City, at Mr. Davy's house.

A. That was in 1878.

Q. Since that time, 1878, what was the longest time you spent at their house in Jersey City?

A. I think just a part of the vacation in summer; four weeks, I think, the next year.

Q. 1879?

A. I was not there in 1879.

Q. How about 1880?

A. I think I was there in 1880 and 1881.

Q. How long?

A. Just about the same time. I always spent the month.

Q. How long were you there in 1881?

A. Just four weeks from the time I went there to the time I left.

Q. Who was at Mr. Davy's house in 1881; what persons?

A. Besides myself?

Q. Yes.

A. His father was there, Mr. Davy's father, and that is all I remember beside myself.

Q. You mean his father-in-law.

A. Yes, sir; Mrs. Davy's father.

Q. Anybody else?

A. I recollect of nobody else.

393 Q. Mrs. Davy?

A. Yes, sir, of course; Mrs. Davy and the little boy.

Q. Were they there when you left for Alexandria Bay?

A. Yes, sir.

Q. You left for Alexandria Bay at night?

A. Yes, sir.

Q. At what time did you get there?

A. I should say somewhere between seven or half past seven or eight o'clock. We took the night train to Oswego.

Q. You and Mr. Davy alone?

A. Yes, sir.

Q. What time did you arrive at Oswego?

A. In time for breakfast. They waited breakfast for us at the house.

Q. At what time?

A. About eight o'clock, I should say.

Q. Mrs. Davy was there when you left?

A. Yes, sir. We left her in the house with the little boy.

Q. You are sure of that?

A. Yes, sir; very sure.

Q. Now, then, he stayed in Oswego, as I understand it, from Friday morning——

A. Thursday morning.

Q. From Thursday morning until Saturday morning?

A. Saturday noon.

Q. Then he left?

A. Yes, sir.

394 Q. Then you saw nothing more of the matter until about a week from that time?

A. It was more than a week. I didn't see him again until the day he died?

Q. Then it was two weeks from that time?

A. Yes, sir.

Q. You were not at Alexandria Bay during that time at all?

A. No, sir; not there at all.

Q. You arrived in Alexandria Bay Saturday morning?

A. Yes, sir.

Q. At what time did you leave Oswego?

A. At midnight the night before.

Q. You got to Alexandria Bay about eleven o'clock?

A. Oh, no, sir.

Q. Is not that about the time the boat came in?

A. No, sir; it was before breakfast.

Q. But you didn't get there until Saturday morning?

A. Very early Saturday morning.

Q. And he died in the afternoon?

A. Yes, sir; after three o'clock.

Q. He was a very sick man when you got there?

A. I think he was; yes, sir.

Q. You didn't expect him to live?

A. I did; yes, sir. When I first got in the room I did, and I was quite surprised that he died so soon.

Q. Now, then, after his death, will you undertake to say that there was no man in that room performing some offices in regard to Mr. Davy?

395 A. You mean right after death?

Q. No. I mean right before he was taken away from Alexandria Bay.

A. Yes, sir; there was an undertaker and there was a man they called the embalmer, and I saw Dr. Rae there.

Q. A man called the embalmer?

A. Yes, sir.

Q. You understood he was embalmed?

A. Yes, sir; I heard them say so.
Q. Did you or not pay any particular attention to who those men were that were about him?
A. Yes, sir; I did; Mr. Strong.
Q. Did you inquire their names?
A. No, sir; but I knew every one that was there except these two.
Q. Did you inquire their names at all?
A. No, sir.
Q. You don't recollect you saw this man Hunt?
A. No, sir.
Q. Do you know a man by that name?
A. No, sir.
Q. And for all you know one of these two men, the undertaker or the other man, might have been William H. Hunt—might have been?
A. I suppose it might, but I don't think so.
Q. Now, you have answered my question.

Redirect:

Q. Did or not you assist Mrs. Davy in gathering together
396 the things which he left, packing them before taking his body to Alexandria Bay?
A. Yes, sir; I did.
Q. Can you say whether or not any pistol was found among his effects?
A. I saw no pistol.
Q. None at all?
A. No, sir.
Q. Before dressing his body with this shirt and drawers and socks was anything done to it; and, if so, by whom?
A. No, sir; only by herself; what she did I don't know.
Q. Did she use any water?
A. I think she did. I think she asked me to pour some.
Q. She was in the room alone with him?
A. Yes, sir; all alone.

A. C. MATTOON, sworn in rebuttal for the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you reside, Mr. Mattoon?
A. I reside in Oswego, New York.
Q. How long have you resided there?
A. Fifty-five years.
Q. In what business were you engaged, if anything?
A. I am engaged in several branches of business; shall I name them?
Q. You may.
A. I — engaged in the rental of 30 tenant buildings which I built

three years ago. I am acting United States deputy mar-
397 shal. I am acting civil justice of the peace, and conducting a ship yard and dry-dock for a ship yard, where I employ a large number of men. I am giving some of my time as one of the managing trustees of the State Normal School at Oswego, and I am the manager of a college of language at Oswego. I have also a large commercial greenhouse that I own and conducting it by directions—that is, through my employees. I own it, and it is conducted under my direction. That is about all I am actively engaged in.

Q. How long have you been acting as civil justice?

A. Two and a half years.

Q. What is your age?

A. 75 years old.

Q. Were you acquainted with William A. Davy in his lifetime?

A. I was.

Q. How long had you known him prior to his death?

A. I became acquainted with Mr. Davy first in 1874 or 1875.

Q. And then were you in the habit of seeing him from time to time up to the time of his death?

A. Several times during the year—I should say as often as five or six times a year.

Q. Where did you see him at these times?

A. At Oswego, at Alexandria Bay, at his office in New York, and at his home in Montgomery street, Jersey City.

Q. When he was at Oswego at what place would you see him there?

A. At his father-in-law's, Henry L. Davis, and I met him in our club-room, spent evenings with him.

398 Q. During all this time did you ever see him intoxicated or under the influence of liquor?

A. No, sir; I never saw him intoxicated.

Q. Did you ever see him drink?

A. I have; I have seen him drink at Oswego and I have seen him drink at Alexandria Bay and I have seen him drink at New York city.

Q. Were you at Alexandria Bay during the summer that he died?

A. I was.

Q. Where did you see him last before he came to the bay that summer?

A. I saw him at my house in Oswego.

Q. Can you state when?

A. Yes, sir; it was on Friday, about the 23 of July.

Q. Just before he went to the bay?

A. The day before he went to the bay.

Q. At that time in Oswego did you see him anywhere else besides your own house?

A. Yes, sir; I did.

Q. Where?

A. In our social club room.

Q. What was the condition of his health then as it appeared?

A. He was in very poor health, in a low state of health; he seemed pale and emaciated in flesh and seemed to me a sick man or a man in a low state of health.

Q. When did you go to Alexandria Bay then?

A. I went to Alexandria Bay at one o'clock on Friday, in
399 the one o'clock train, and arrived at Alexandria Bay at seven-fifteen in the evening.

Q. Did you know when Mr. Davy expected to come?

A. I knew that he expected to come; I made arrangements with him at my house to meet him the next day; I invited him to go with me.

Q. When did he arrive then?

A. He arrived Saturday afternoon at 7.15, or within a few minutes of that time.

Q. Was that the time the boat arrived?

A. Yes, sir; that was the time the boat arrived, and she was very regular.

Q. Where did that boat come from?

A. From Cape Vincent, 28 miles up the river.

Q. When and where did you see him upon his arrival?

A. I saw him at Alexandria Bay on the guard of the boat, near the gang plank.

Q. Will you just please state what took place, where he and you went, what you saw?

A. When I heard the whistle of the Maynard blow I walked down to the dock, as I had told Mr. Davy I would meet him. I walked down to the dock and recognized Mr. Davy standing on the guard of the boat, near the gang plank. He didn't press off with the passengers, but when he did come to the gangway I stepped forward—the guard of the boat is just even with the dock or within a few inches—I stepped forward and took him by the hand and said,

"Don't hurry." He was lame, walked with a cane. I said,
400 "Don't hurry." I took him by the hand and said, Give me your checks. No, he said, I will give them to John, the colored man, the porter of the Crossman House. He handed John his checks. I said, Let's get out of this crowd and go around to the front of the house on the sidewalk.

Q. Was John, the colored man, the porter, this boy who has testified here as Fred. Schuyler or Fred. Dale or Cyrus Dale?

A. We used to call him Baptists John. He was the porter, and had been for many years.

Q. Was he the same man calling himself Fred. Dale?

A. No, sir; he was not. John was a mulatto.

Q. Did you see William White there?

A. I did not—that evening. I was well acquainted with him.

Q. Just show which way Mr. Davy went to the hotel, and with whom, if anybody.

A. Mr. Davy took my arm at the boat. We walked slowly around to the front part of the hotel, and there was no other person with us that I saw. No other person held any conversation with us, at any rate. We walked around to the front of the hotel and sat down on

the piazza. I said to Mr. Davy, Wait until this crowd registers and then go in. I asked him if he had got his room engaged. He said, I have my room engaged, and then I said, Wait until this crowd gets away, and then we will go in.

Q. There is no other way?

A. There is a rear way—going over the rocks, as it is called, into the rear of the house—that people do go in.

401 Q. He went with you around in front?

A. Yes, sir; on the sidewalk.

Q. State, then, what further took place that you saw that evening before you left him.

A. I sat and conversed with Mr. Davy ten or twenty minutes, and I said, Mr. Davy, you are tired; you had better go in now and go to your room and rest. Mr. Davy did go in; spoke to Mr. Crossman. Mr. Crossman said to him, Mr. Davy, your room is ready, and I think he called the quarter or bell-boy. I saw Mr. Davy go to the elevator and get into the elevator. I did not go up with him, nor didn't see the elevator stop, but I saw him go to the elevator door, and I turned around and went to my hotel.

Q. Where were you stopping then?

A. At Thousand Island House.

Q. How far was that from the Crossman?

A. Not over 400 feet; four hundred to 500.

Q. Where and when did you see Mr. Davy next after this?

A. I saw him the next Sunday morning, at about 9 o'clock.

Q. Where?

A. At the Thousand Island House, in my greenhouse or conservatory. He came there a little before 9 o'clock in the morning.

Q. What took place then? Had you had your breakfast then?

A. I had not. I had invited him to breakfast with me. He said, I have breakfasted. I said, Sit down and smoke your cigar, and I will return in a few minutes. I will go and get my break-

402 fast. In my absence I can't tell what he did, but I did go up and breakfast and return immediately, and sat with Mr. Davy until 11 o'clock—two hours. Mr. Davy then went out, I suppose saying that he was going to his hotel. Whether he did go directly or not I can't tell. He said, I will go over and lie down and then get my dinner.

Q. When did you next see him after that?

A. I saw him the next Tuesday evening.

Q. I mean that day. Did you see him again that day?

A. I saw him between three and six o'clock that evening at the Crossman House. After I got my dinner I went over to see him. I went by appointment to the hotel to see him and did see him.

Q. Where did you see him? What time did you spend there with him?

A. I spent an hour.

Q. Where?

A. On the piazza, in the shade.

Q. How was the weather then?

A. Very warm. The thermometer that day, I think, would range in the neighborhood of 80.

Q. Then when did you see him after that, Mr. Mattoon?

A. I saw him Tuesday evening.

Q. The following Tuesday evening, where did you see him then?

A. I saw him at the Crossman House.

Q. Whereabouts at the Crossman House?

A. I saw him more particularly in the billiard-room.

Q. What were you doing there?

A. Played billiards with him.

403 Q. With Mr. Davy?

A. Yes, sir.

Q. How often did you play billiards with him that week?

A. I played twice positively at the Crossman House and once at the Thousand Island House.

Q. What time of the day?

A. In the evening by gas-light.

Q. How many times did you see him that week?

A. I think I saw him every day with the exception of Monday after the first Sunday. I can't now recall that I saw him that Monday, but on Tuesday I saw him.

Q. Did you see him the next Sunday?

A. I can't say to my recollection now that I did.

Q. Did you see him the week that he died?

A. I saw him on Tuesday or Wednesday morning early. I am not positive which. A boatman came to me—notice was sent to me that he was sick and I went to see him.

Q. Where did you see him?

A. In his room.

Q. Was he sick there then?

A. He was.

Q. What did you see, anything? What was his condition?

A. His condition was that of quite a sick man. His bed seemed to be mussed up—that is, tumbled around ordinary.

Q. That was before Mrs. Davy came there?

A. Yes, sir.

Q. At that time was he delirious or not?

A. He was not, he was rational; seemed to be rational and

404 coherent in his conversation.

Q. Do you recollect what the weather was at that time?

A. I do.

Q. How was it?

A. Very warm; when I mean very the thermometer is in the neighborhood of 80—75 to 80 or 85.

Q. Well, you saw Mr. Davy at that time and saw that he was sick, as you have mentioned. How long were you with him then?

A. At the first meeting I was with — half an hour or thereabouts.

Q. Was anybody else in the room at the time you were there?

A. No person at all, except Mr. Davy and myself.

Q. During that time did you observe any evidences of delirium or anything of that kind?

A. I did not.
Q. When did you next see him after that, Mr. Mattoon?
A. I saw him the next day in the afternoon. I think I saw him on Wednesday.

(By the COURT:)

Q. What day was this you have been speaking of?
A. Tuesday afternoon or possibly Wednesday.
Q. I understand you to say that it was Wednesday morning?
A. I am not positive when the information came to me that he was sick. I went there as soon as I could possibly get there.

(Further direct:)

Q. After you received notice that he was sick Wednesday morning, then when did you next see him?
405 A. Thursday.
Q. Was Mrs. Davy there when you next saw him?
A. She was not.
Q. Where did you see him then?
A. I saw him in his room; the same room that I saw him first in.
Q. Was anybody else with him then?
A. There was not.
Q. How long were you there then?
A. Ten to twenty minutes.
Q. Did you or not converse with him?
A. I did.
Q. Did you observe then any evidence of delirium or any evidence of that kind?
A. I did not. I only observed evidences of weakness.
Q. When did you see him next after that?
A. I saw him next after that after Mrs. Davy had arrived, either that afternoon or Friday in the forenoon.
Q. Where did you see him then?
A. I saw him in another room; a room facing north; facing what is called that Holland residence at the north end of the house.
Q. Was any one in the room when you saw him there beside yourself?
A. Mrs. Davy was there; Mrs. Ward.
Q. How long were you there with him then?
A. From half to three-quarters of an hour.
406 Q. Did you converse with him?
A. I did.
Q. And he with you?
A. He did.
Q. Did you observe then any evidence of delirium?
A. I did not.
Q. And then when next after that did you see him?
A. I never saw him alive after that.
Q. Do you recollect about what time he died?
A. Only from information. I was not present when he died.

Q. You heard of it soon after his death?

A. Yes, sir; within a few minutes.

Q. About what time of the day?

A. In the middle of the afternoon, two or three o'clock; about three o'clock I heard of it; about four o'clock a messenger said to me he had just died.

Q. Who made the arrangement for the boat to take his body to Clayton?

A. I made the arrangements—chartered it; fixed the price and the condition upon which the body should go to Clayton.

Q. What boat was it and what was the condition?

A. She was a small pleasure-boat called the R. P. Flowers, 42 and a half feet long by 9 feet wide, built at Watertown, and running down the river twelve or fifteen miles.

(By the COURT:)

Q. Did you make the arrangements all the way through or for the boat only?

A. I made arrangements for the boat only.

407 (Further direct:)

Q. Who accompanied the body from the bay to Clayton?

A. Mrs. Ward, as she is now, Mr. Davy's brother, the young lady who has testified here by the name of Davis, and myself were the only persons except the three that comprised the crew on the boat.

Q. Do you know this man, William H. Hunt, whose testimony has been given?

A. I have seen him on the stand several times.

Q. Did he accompany that body?

A. He did not.

Q. Who removed the body from the boat to the cars?

A. The employees of the railroad company at Clayton, under my directions. They took it from the cabin of the boat, put it on a truck, and wheeled it up about 50 feet from the edge of the dock and put it into the car. The train consisted of one passenger car and an engine.

Q. Did you accompany the body any further than Clayton?

A. I did not; I returned to Alexandria Bay in that little boat.

(By the COURT:)

Q. Was that an open boat or did it have a cabin?

A. A cabin with open windows.

Q. So that you had a full view of everything in the cabin and boat?

A. Yes, sir; there is no possibility of a person being on that boat without my observing them. The engine-room was open and every part of the boat was open. It was a summer pleasure-boat.

408 *A. C. Mattoon.*

Cross-examination by Mr. STRONG:

Q. How long have you held these positions that you have spoken of; the justice of the peace, for instance?
A. Two and a half years.
Q. You held that at the time of the last trial?
A. I did.
Q. How long have you owned this greenhouse?
A. 30-odd years.
Q. Have you always owned it yourself?
A. Yes, sir.
Q. It never stood in anybody else's name?
A. No, sir.
Q. How long have you owned these tenements that you spoke of?
A. I owned part of them since 1872; I built the whole of them in 1871 and 1872.
Q. How long have you owned this dry-dock?
A. Nearly forty years.
Q. Continuously?
A. Yes, sir; continuously.
Q. Do you ever remember of being examined in proceedings supplementary to execution?
A. I do.
Q. Do you remember the title of the case?
A. I do not.
Q. Were you examined in the case of Elizabeth Brown and Samuel B. Johnson against Abner C. Mattoon?
A. I was.
Q. Before whom?
409 A. Before Mr. Barnes.
Q. C. C. Wentworth appeared as your attorney?
A. I don't recollect; I think not.
Q. C. C. Wentworth appeared for the plaintiff?
A. Yes, sir.
Q. And Abner C. Mattoon in person?
A. Yes, sir.
Q. That is yourself?
A. Yes, sir.
Q. Did you own the real estate on which this greenhouse stands?
A. I did.
Q. Now, Mr. Mattoon, that examination was January 18, 1883?
A. I don't recollect the date.
Q. About that time?
A. A good many years ago.
Q. Was it about that time?
A. I cannot fix the date.
Q. Is your recollection as good about that as it — about other things?
A. It depends entirely upon the impression.

Q. I am not asking you about your impression; I want to know whether it is as good about other things as it is about that.
A. I think it is.
Q. And as good about that as it — about other things?
A. Yes, sir.
Q. Now give us as near as you can the date of this exami-
410 nation in supplementary proceedings.
A. I should say 12 or 15 years.
Q. Do you know when that judgment was obtained?
A. I do not.
Q. Don't you know that that examination was about January 18th, 1883?
A. I don't from my present recollection; perhaps you might refresh me with the transcript.
Q. Did you testify this way on this examination? "I have no real estate that I know of."

Objected to as improper—as an improper way of impeaching a witness.
The court ruled that the testimony could not be admitted.
Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

Q. You testified upon the former trial in this case, didn't you?
A. Yes, sir.
Q. Do you remember being asked whether you were in any business?
A. I do.
Q. Do you remember what your answer was?
A. I do.
Q. What?
A. Connected with the commerce of the lakes.
Q. Do you remember testifying in this way? "Are you in
411 business? Ans. Yes, sir. Ques. What business? Ans. Civil justice. Ques. Any other regular business? Ans. No other regular business. Ques. And have been for how long? Ans. Four or five years." Do you remember testifying that way?
A. I do not recollect it, sir.
Q. Just look at this record here and see if you can't refresh your recollection.
A. I presume you have read it from the book; I shall presume you have read it correctly.
Q. If you did so testify is that true?
A. It was true as far as it went.
Q. Then you didn't state fully what your business was?
A. I did not if that is all I stated; that is only a portion of my business.
Q. You didn't say anything about being interested in the dock yard?
A. Not that I recollect.

Q. You didn't say anything about collecting the rents of 30 tenements?

A. Not that I recollect. I didn't think it was necessary to volunteer any answers.

Q. You didn't say anything about the school for languages or being trustee of the normal school?

A. I didn't consider it necessary; I was not asked.

Q. You were asked about your business?

A. I was.

Q. And all the statement you made about your business was that you were a civil justice?

412 A. That is one statement.

Q. And then you were asked whether you were in any other regular business, and you answered "no other regular business."

A. I don't recollect that answer.

Q. Will you say that you didn't say so?

A. I have no recollection of it.

Q. I am asking you whether you will state positively that you didn't say so?

A. I am not positive whether I said so or not.

Q. And if you did say so, was it true or not?

A. It was true, from the best of my recollection, as I stated it at that time.

Q. You don't mean to say that at the time of the last trial when you were asked about your business that you had forgotten what business you were in at the time?

A. I hadn't forgotten, but I didn't think it necessary to detail my business.

Q. Don't add anything; when you have answered the question please stop. You never were out in a boat with Mr. Davy in 1881?

A. I was not.

Q. You didn't see him in the day-time during the week?

A. I did.

Q. During the week?

A. I did.

Q. Week days?

A. I did.

413 Q. Did you testify to that on a former trial?

A. I don't recollect what I testified to on that former trial.

Q. Did you see him at any other time on the week days except in the evening?

A. I think I did. I think he came to my office.

Q. Do you remember any day?

A. I don't think I can fix the day, any particular day——

Q. Wait a moment.

A. When I was with him in the day-time.

Q. Wait a moment.

A. I have a right to explain.

Q. The first time you saw him, you say, was when he got off the boat?

A. That is the first time I saw him, when he arrived at Alexandria Bay.

Q. How long were you with him at that time?

A. In the neighborhood of half an hour; it might have been fifteen minutes longer.

Q. Where did you leave him?

A. I was standing in the office between the door and the elevator.

Q. Do you know who rowed him that season of 1881?

A. Only from hearsay.

Q. Where did you see him during the evenings?

A. At the Crossman House and at the Thousand Island House.

Q. Where at—what part of the room?

A. In the billiard-room, in the office, and on the piazza.

414 Q. When he arrived was he in any condition to see anybody?

A. Yes, sir.

Q. To mingle generally with people?

A. I think not. He was a sick man.

Q. In a condition to see others besides his intimate friends?

A. Will you explain what you mean by condition?

Q. I will leave that to you. Was he in a condition to see others besides his intimate friends?

A. I think he was too sick—too indisposed.

Q. You say he went into the elevator the evening when he arrived after you met him?

A. Yes, sir.

Q. Did you see him take the elevator?

A. I can't say. I saw him go toward the elevator—within five or eight feet of the elevator—when I last saw him. I am not positive whether I did or not.

Q. You testified on the former trial as to your acquaintance with Mr. Davy. How long is it that you say you had known him?

A. I think I have known him up — his death and since about 1874 or 1875, a year or two before his marriage.

Q. Did you testify this way on the last trial: "Were you acquainted with Mr. William A. Davy in his lifetime? Ans. I was. Ques. For how many years? Ans. For the last ten years before his death. Ques. Would that make it from 1871 — 1881, about that time? Ans. No; say from 1873. I first made Mr. Davy's acquaintance in 1873." Does that refresh your recollection now?

415 A. No; it only establishes my memory now. It may be 1873 or 1874.

Q. Do you remember testifying that way on the former trial?

A. I don't know.

Q. Now you say that when he arrived you said to him, "Give me your checks," and he said, "No; I will give them to John."

A. I don't recollect testifying so.

Q. (The stenographer read the direct testimony on that point.) Do you remember testifying to that only a few minutes ago?

A. That may be the substance of it.

Q. Do you remember testifying on that subject on the former trial?

A. I do not.

Q. Didn't you testify that way: "Ques. Just state what took place then. Ans. I said to him, "Give your checks to John and we will walk around and get out of this crowd." Do you remember testifying that way?

A. I think that was the way I testified—that is, substantially what I do now.

Q. Did you say anything to him about giving the checks to you?

A. I might have said, Give them to me or give them to John.

Q. You observe there is quite a difference?

A. No; I do not.

Q. You don't observe that there is quite a difference?

A. I do not. It is carrying out the giving of the checks to John.

Q. How long did you say that you saw him the next morning?

416 A. About two hours—from about nine until about eleven in the morning.

Q. Are you willing to say that you saw him for more than an hour and a half? Didn't you testify so on the last trial, "I should say for an hour and a half we were together in conversation"?

A. I may have said that, but the best of my recollection now is——

Q. You have answered the question. How often did you see him in the evening during that week after his arrival?

A. I saw him at least four times during the week.

Q. Didn't you see him every evening?

A. I did not, not that I now recollect of.

Q. What time during the day did you see him on week days?

A. I don't think I saw him more than once or twice, if more than once, in the day-time during that week.

Q. When was that?

A. I can't fix the date.

Q. How long were you with him at any one time besides this first Sunday that he was there?

A. At least an hour.

Q. How many times were you with him at least an hour?

A. Twice at least an hour, and the other meetings at least thirty to forty-five minutes.

Q. You have testified twice on former trials?

A. I believe I have.

Q. And have intended to give substantially the same testimony each time?

417 A. I have intended to answer the questions truthfully.

Q. I didn't ask you that. I ask you whether you had intended to give substantially the same testimony each time?

A. I can't say that. I try to give responsive answers.

Q. You have answered that; don't continue.

A. There is so much ambiguity in your questions.

Q. You have taken quite an active interest in this litigation?

A. I have.
Q. A very decided interest?
A. A very decided interest.
Q. You have endeavored to help the plaintiff all you could?
A. I have, fairly.
Q. You have on each occasion—when there was testimony of any witness to be taken you have attended?
A. I have attended on three or four separate occasions. The testimony was taken out of court.
Q. You have attended every time the case was called for trial in Trenton?
A. I have.
Q. You have consulted with counsel, haven't you?
A. I have.
Q. You have advised generally with them?
A. Not generally.
Q. You have advised with them as to the conduct of the litigation?
A. I have never advised as to the conduct of the litigation but once. Counsel asked me——
418 Q. I don't ask what was said. Do you wish to be understood that you saw Mr. Davy more than once after he was taken sick?
A. I do.
Q. You saw him the first time, when?
A. Either during the evening he was taken sick, or the next morning early.
Q. The night that he was taken sick—what do you mean by that; what day do you refer to now?
A. I can't swear positively as to the day. It was either Monday or Tuesday.
Q. Do you know what day he was taken sick?
A. Not positively. To the best of my recollection, it was on Tuesday.
Q. You heard the testimony that he was taken sick on Wednesday?
A. I have not.
Q. Wednesday morning he was found sick in his room?
A. I have heard that.
Q. That Mrs. Davy was telegraphed for, and that she got there Thursday?
A. I have heard that also.
Q. You don't recollect the day of the week when he was taken sick?
A. To the best of my recollection, I was informed late in the afternoon of Tuesday that Mr. Davy was sick.
Q. When did you next see him?
A. I next saw him the next day, I think.
Q. Do you know Dr. Watson?
419 A. I do.
Q. And have known him a long time?

A. I have known him ten years.
Q. He is a physician up there on Alexandria Bay?
A. I understood he is. I never called him in.
Q. Do you remember testifying this way, in answer *of* a question of Mr. Linn on the former trial: "Ques. You didn't see him after he was taken sick? Ans. I did not. Ques. Did you ever see him after that Sunday? Ans. I did not, alive."
A. I have no recollection of that, sir.
Q. Will you look at this record and refresh your recollection?
A. I don't think it will, if you read from the record.
Q. I am reading from the record.
A. Very good. I assume that you read from the record. I will accept your offer and look at the testimony myself. (After looking at the book:) I don't recollect testifying that way at all. I think there is an error in the stenographer's notes.

(By the COURT:)

Q. You spoke of playing billiards in the evening with Mr. Davy. How often during the week?
A. Twice, positively; three times, I think, at the Crossman, and once at the Thousand Island House.
Q. Then you played three times, and probably four times?
A. Yes, sir.
Q. Those were the evenings that you met him?
A. Yes, sir.
Q. What game did you play, a four-ball game?
A. We played four-ball carom game.
420 Q. How long did it take to play a game?
A. Thirty minutes to play a single game and an hour to play two games.

Redirect:

Q. Do you recollect now, Mr. Mattoon, seeing Mr. Davy on the second Sunday after his arrival at the bay at that time?
A. I think I saw Mr. Davy first the second Sunday at the Crossman House a few minutes. I am not positive on that whether I saw him at my greenhouse office or whether I saw him at the Crossman House.
Q. I want to call your attention to testimony given upon the former trial as recorded in the printed case, and see whether it refreshes your memory. I read from page 115: "Did you see Mr. Davy the next Sunday? A. The second Sunday after he arrived at Alexandria Bay? Q. Yes. A. I did. Q. Where did you see him, and how long a time did you spend with him? A. I spent the afternoon—one or two hours with him in the afternoon—in my conservatory or greenhouse (call it what you choose—it was both), at the Thousand Island House. Q. That was the second Sunday? A. Yes, sir; the second Sunday after he arrived. Q. Were you and he alone together? A. We were alone. No people were coming. The guests of the house, they were in the habit of coming in and

viewing the plants from time to time, but we were conversing alone." Does that refresh your memory as to what took place?

A. Only so far as relates to the place of meeting. When the question was asked my recollection was that we had met.

421 That refreshes my memory so that I can fix the place of meeting. Instead of saying either at one place or another, I think that the meeting on the second Sunday was at my greenhouse.

Recross:

Q. How many points in billiards did you play?

A. Thirty-four.

Q. Four-ball game with thirty-four points?

A. Yes, sir.

By the COURT:

Q. You have not located the greenhouse as to the Crossman House?

A. 500 feet south of the Crossman House, by the river.

Q. Near the Thousand Island House?

A. It was exactly in front of the Thousand Island House.

Mrs. ADA D. WARD, recalled in rebuttal, testified as follows:

Direct examination (by Mr LINN):

Q. Do you recollect when Mr. Davy left home, in the summer he died, to go to the Thousand Islands?

A. Yes, sir; I think I do.

Q. What day of the week was it?

A. It was on a Wednesday evening.

Q. Did any one go with him from his home?

A. Yes; Miss Davis went with him from our home.

Q. How did it happen you didn't go with him then?

A. Well, there was something that was needed in the house. Shall I say what? The cellar was out of repairs and the water all collected in the cellar.

422 Mr. STRONG: It is hardly worth while to go into that.

Q. What was the condition of his health at that time?

A. He was very sick. I felt very badly to have him go.

Q. Was he fleshy or thin and emaciated?

A. Very thin.

Q. Do you recollect of his having taken cold at any time previous to that—a severe cold?

A. Please say that again.

Q. Do you recollect of his having taken a severe cold some time previous to that?

A. Yes; the summer of 1879 he took a very bad cold; he never recovered from that.

Q. How did that affect him?

A. It settled on his lungs.

Q. Do you know whether he ever got over that entirely?
A. No, sir; I do not think he ever did.
Q. What were his symptoms of that—indicating suffering?
A. He always complained of a pain at the top of his left lung, and he had a cough that never left him.
Q. Who was your physician?
A. Dr. Rae was the physician for myself and child.
Q. Who was Mr. Davy's physician?
A. He consulted a physician, Dr. Kellerman, of New York. He went to Dr. Kellerman most of the time.
Q. Do you know whether Dr. Kellerman is living or not?
A. No, sir; he is not.
Q. Did you ever accompany him to Dr. Kellerman's?
A. Twice.
423 Q. Did Mr. Davy take stimulants—alcohol?
A. Yes, sir.
Q. Did you give them to him sometimes?
A. Yes, sir; frequently.
Q. Did he take them under medical advice?

Objected to. Objection overruled.
Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

Q. Did he or not take them for medical purposes?

Objected to. Objection overruled.
Exception prayed and allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. Yes, sir.
Q. How many times did you go to Dr. Kellerman with him?
A. Very often after he had the cold in March of 1879. We went several times—perhaps two or three times a month—that spring.
Q. What were his symptoms after that; in 1880, for instance?
A. He had a bad hemorrhage in August, 1880.
Q. And after that did he have any symptoms of the same kind?
A. Yes, sir; he had three or four of them after that.
Q. Did he expectorate any?
A. Frequently; always in the morning upon his rising.
Q. What was it, and what was the appearance of it?
A. A mucous matter, streaked with blood.
424 Q. What were Mr. Davy's habits as to business?
A. He attended to business almost up to the time of his death, almost every day for a certain number of hours.
Q. What were his habits in that respect?
A. He left the house about nine or half past nine and sometimes would go to the factory—drive to the factory and back again, and then over to Wall street, and then home to dinner or lunch about two o'clock.

Q. When he drove out to the factory or other place did any one accompany him out?

A. I did most all the time; sometimes his brother Frank.

Q. Did you ever see him intoxicated or under the influence of liquor?

A. Never.

Q. When he went to Alexandria Bay this time you say that he started on Wednesday, and that you left home. Where did you go to?

A. I went to the Catskill Mountains that summer, expecting to stay about a week or ten days, and expected to be at Alexandria Bay by the day he died.

Q. Do you recollect when you received the telegram of his illness?

A. I received it on Wednesday afternoon, just at two o'clock.

Q. When did you arrive at Alexandria Bay?

A. The next morning about ten o'clock.

Q. Who accompanied you?

A. Mr. Frank Davy.

Q. What did you find his condition when you went there?

425 A. I found him very sick, but perfectly rational.

Q. Where did you see him?

A. I saw him in a small room at the end of the upper hall, a very small room, and I was not pleased with it, and I sent to the office and asked if I could not secure more accommodations, a better room, and then I had him moved down the hall into two rooms on the second floor.

Q. Who occupied this room from the time you went there until the time he died?

A. Mr. Frank Davy occupied the outside room and Mr. Davy and I the second room, and I had the bed turned so that I had to pass through Mr. Frank Davy's room into the inside room.

Q. Was the door leading from the room into which Mr. Davy was placed to the hall?

A. There was a door.

Q. Was the door open or shut?

A. It was always closed. I had the side of the bedstead turned against it.

Q. Did you see Dr. Watson after you went there?

A. Yes, sir.

Q. Did he tell you anything about when he thought you could take him home?

A. Yes, sir. I asked him, and he said he thought I could move him on the following Saturday or Sunday, and then I asked whether there was a boat on Sunday, and he said he thought there was not, and he said I could take him away on Saturday. I expected to take him to Oswego.

426 Q. During the time between you arrived there and his death was he delirious any?

A. No, sir; not delirious at all until the following Friday night, when he had a sinking or a fainting spell.

Q. How long did that last?

A. Not more than one minute; and I put some camphor on a handkerchief that I had and began to fan him, and he came to.

Q. Did he vomit anything after you came there?

A. No, sir.

Q. Did he expectorate?

A. Oh, yes, sir.

Q. Did he spit anything?

A. Phlegm, constantly; yes, I remember seeing one or two mouths full of blood after that.

Q. Did he spit blood?

A. Oh, yes, sir.

Q. What was the condition of his flesh—hot or feverish or cold?

A. At times it was not an excessive fever, as far as I could see, but it was feverish.

Q. Did he call for a drink?

A. Oh, yes, sir.

Q. Did he eat anything when you were there?

A. Yes, sir.

Q. What did he have to eat?

427 A. He had broths, and on Friday morning he ate two soft-boiled —, and after that at dinner he had broth and ice cream and some bread I fixed with very rare beef and gravy, and on Saturday morning he called for breakfast, but did not eat it.

Q. Did he sleep any after you got there?

A. Yes, sir. I went to bed with him on Thursday night, and he slept. I was only up once. He asked me for a drink of water, and I got that, and I found him in a profuse sweat, and I changed his under flannel shirt, and I had no night-shirt to change.

Q. Was Mr. Frank Davy in the other room?

A. Yes, sir; he slept, and the door was open.

Q. So that you were alone with him and slept with him that night?

A. Yes, sir.

Q. Was William White to see him any time after you came?

A. No, sir.

Q. Did you see William White after you came?

A. No, sir.

Q. You knew him?

A. I knew him well.

Q. How often had you been at the bay with Mr. Davy after you were married?

A. With the exception of one summer, I think I was with him every summer from the time I was married. I didn't go the summer he died, but, with the exception of one summer, I think I was there every summer.

Q. When you were there what was his habit of going out in the boat, rowing?

428 A. Always going out in a boat fishing. One summer I had chills, and I think there was one or two days I didn't go.

Q. You didn't go, did he go?

A. No, sir; he stayed and took care of me.

Q. When you went what places did you visit on the river?

A. We visited the islands, and we used to go to a place kept by a man named Lear, at Rockport. Then we used to get there about dinner time; it took just about that time. We stayed there for dinner and then afterwards kept on the Canadian shore down to the fishing grounds, four or five miles below that.

Q. During those times did he drink anything?

A. Yes.

Q. What did he drink when you were with him?

A. When we got over to Lear's place the first thing he did was to have a milk punch; it didn't make any difference what time it was.

Q. About what time did he die?

A. Just about half past three.

Q. Who was with him when he died?

A. I was all alone with him.

Q. Who was in the adjoining room?

A. Miss Davis, alone.

Q. Nobody else there at all?

A. No, sir.

Q. Was there any undertaker there, or was there one in Alexandria Bay, or did you have to send for one?

A. We had to send for one. I sent Mr. Frank Davy to the
429 office about that.

Q. What did you do in the meantime?

A. When I found there was none and this undertaker could not be back between five and half past I did the washing. I washed him and fixed him and asked Miss Davis to get me a suit of summer clothes.

Q. What did you do?

A. I put on a gauze undershirt and drawers and a pair of white socks.

Q. Were these things changed until he came home?

A. No, sir.

Q. One of the witnesses testified that he had a pair of black pants—Mr. Hunt. Had he that on?

A. No, sir; he didn't have any black pants.

Q. What suit did he wear?

A. A grey suit—a very heavy suit—that he had made to wear on the steamer in going to Europe the fall before—very heavy.

Q. What time was he removed from that room?

A. He was removed from that inside room between ten and eleven, perhaps after eleven, o'clock; late at night, after the dancing had started in the house.

Q. Where was he taken to?

A. Into an adjoining cottage; a cottage at least 15 yards away.

Q. Do you know this man William H. Hunt?

A. I never saw him until I saw him in the room last spring.

Q. Who did you pay for having him removed and sitting
430 up with the body?

A. I paid two men—one called Louis Dyreer and Andrew Duclone.

Q. What time did you leave the bay with the body to take it home?

A. Just after one; just about one, I think.

Q. What day?

A. Sunday.

Q. Who accompanied you with the body to Clayton?

A. Miss Davis, Mr. Frank Davy, Mr. Davy's brother, Mr. Mattoon, and then there was quite a small boy on board the boat and the man at the wheel and a man at the furnace or engine.

Q. Was Hunt upon the boat?

A. No, sir.

Q. Who assisted in moving the body from the boat to the cars?

A. Two brakemen, I guess, that came off this special train. There was a gentleman came forward and introduced himself to me as the assistant superintendent of the Utica and Black River boat, a perfect stranger, and he said he had these two men ready to take the body. It was put on one of the trucks that they put trunks on, and Miss Davis stepped up, and there was glass on top of the casket, and she stepped up and threw a linen duster over the glass, and then the gentleman stepped up and directed its movements into the car.

Q. After you arrived there, Mrs. Ward, did you go down
431 to meals at any time?

A. No, sir; I never left the room at all.

Q. You remained with him all the time?

A. Not even crossed the sill of that door until after he died, and I went out in the evening afterwards.

Q. During all that time what was the condition of his mind so far as you could observe from any symptoms?

A. Perfectly rational. He wanted me to read the papers to him every day, and he asked where my trunk was.

Q. What kind of a room was it he occupied when you first went there?

A. It was a long, narrow room, quite a small room; just about the shape of a parallelogram. The bed stood just at the left of the door and the door opened to the bed, and then his head was in such direction that he could look right out of the window opposite. There was nothing by the head of his bed.

Q. How long and how narrow was it?

A. The room was about as long as from that railing to this tread here, and it was a little more than the width of the bedstead; wider than the bedstead.

Q. (It was agreed that the distance was 15 to 20 feet.)

A. I don't know as it was quite as long as that; it was not 20 feet.

Q. Did you see any bottles in the room when you went there?

A. Yes, sir; I did.

Q. What bottles?

A. There was a bottle on the washstand, a brown bottle of
432 bay rum, and a white bottle that had some gin in it, and a bottle of camphor.

Q. What did you do with that bottle that had gin in it?
A. I have saved it until to-day.
Q. You took it home with you?
A. Yes, sir; I have it here.
Q. And another bottle that had some bay rum in?
A. Yes, sir; and that I used for bathing him. I could not get any alcohol.
Q. Before he died were any bottles used about his head for any purpose?
A. Just before Dr. Rae left the house I told him his feet were cold, and I asked him if I filled some bottles with hot water whether it would not start the circulation, and I suppose he sent to the office for them and he sent them up, and Dr. Rae and I placed them one at his feet and the other at his spine.
Q. Do you know what became of the bottles?
A. Yes, sir; I saw them right at the head of his bed.
Q. What kind were they?
A. Two were dark-brown bottles and one was a white bottle.
Q. After you came there did you see any exhibition of his seeing smoke?
A. No, sir.
Q. Or pitch?
A. No, sir.
Q. Or complained of anything lying across him?
A. No, sir; I didn't hear anything of the kind, and nobody
433 said anything of the kind.
Q. You didn't hear or see anything of the kind?
A. No, sir.

Recess.

The COURT: I desire to state to counsel that during recess I looked at the law in reference to the question which I overruled this morning. The question was asked practically of Mrs. Ward whether she recollected Dr. Kellerman prescribing for Mr. Davy, and whether he prescribed stimulants or liquor. Against the earnest protest of counsel I overruled that question upon the ground that it was hearsay; that it was a simple repetition of what Dr. Kellerman said in the presence of Mr. Davy. I am satisfied that I was wrong in overruling that question. As the senior counsel of Mr. Davy suggested, it was proof of the fact and not the conversation that was attempted to be proved, the fact being that Dr. Kellerman prescribed stimulants for Mr. Davy. That fact is material in this case, and the testimony offered, I think, after looking at the authorities, is proper. I shall therefore permit counsel to ask Mrs. Ward the question which I overruled this morning.

Q. Now, Mrs. Ward, you may answer that question whether when you visited Dr. Kellerman with your husband he prescribed for him.

434 Exception granted to defendant's counsel, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. Yes, sir.

Q. What did he prescribe?

A. Among other things he prescribed stimulants; he prescribed other things, and then said he must take them, that it was necessary for him to take them.

Q. Did he say to what extent?

A. He said he must take them until he felt the effect of them; I think that was the language he used.

Q. Did you administer stimulants to him?

A. Oh yes, sir.

Q. In what shape generally?

A. Well, before breakfast I used to give him the yoke of an egg and some sherry. One of the doctors told me to give him milk late at night, and he told me to put a little brandy or whisky in the milk. Sometimes I would change it and make a milk punch. He suggested that, and then he told him to take it with water through the day.

Q. Now at Alexandria Bay, during the time that you were there during his last sickness, what did he drink? Did he ever call for drink?

A. Yes, sir; I fed him mostly on milk with a little brandy in it.

Q. The last days while he was sick?

A. Yes, sir.

435 Q. What did he eat at his meals after you arrived?

A. I thought I told you that he ate some soft-boiled eggs on Friday morning, and he ate for dinner Thursday and Friday a bowl of broth and asked for some beef juice on it and I sent down and got it.

Q. Do you recollect whether Dr. Watson prescribed anything?

A. Did Dr. Watson prescribe anything?

Q. Yes.

A. Nothing whatever.

Q. Did Dr. Rae ever prescribe for your husband in your presence and in his presence?

The same objection as heretofore made is made to this testimony. Testimony admitted. Exception allowed defendant's counsel, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. Yes, sir; he did.

Q. Among other things, what did he *de*scribe?

Same objection as heretofore made. Testimony admitted. Exception allowed defendant's counsel, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. He told me to give him milk and milk with brandy in it and whisky in it. Among other things he gave me a sort of a

436 rule of diet; both physicians did.

Cross-examination by Mr. STRONG:

Q. You married subsequently to Mr. Davy's death?
A. Yes.
Q. When was that?
A. In 1882, the very last of 1882, December.
Q. I presume that this little girl is Mr. Ward's child?
A. Yes, sir.
Q. Mrs. Ward, you were not there in 1881?
A. Not until the time he was sick.
Q. I mean until you came up for his sickness.
A. No, sir.
Q. When you went out rowing did you say your little boy went with you?
A. Almost always.
Q. In the boat with you or him, four in a boat?
A. We all went together usually, and the child would sit down at my feet in the boat.
Q. When did Dr. Kellerman die?
A. I think he died in the year following Mr. Davy's death.
Q. When was it you went over to see Dr. Kellerman?
A. The first time was after he had the severe cold in 1879.
Q. I don't ask in what year he had a cold.
A. It was in that spring of 1879.
Q. How many times did you go over there?
A. I think twice a month for three months, until we went away in the summer time.
437 Q. When he spoke about stimulants did he say the form in which to take it?
A. Yes, sir; he did.
Q. What was the form?
A. He told me the last thing at night to give him brandy or whisky, and then he said if he had any of those occurrences, hemorrhages, during the day to give him brandy and water, and to give him sherry wine before breakfast with the yolk of an egg.
Q. Did Dr. Rae prescribe the form?
A. I don't think he prescribed that. He told me to give him milk punches and keep liquor in the house for him.
Q. Did he prescribe the form?
A. Yes, sir.
Q. Milk punches?
A. Yes, sir.
Q. That was the form in which he prescribed it?
A. He said other ways.
Q. I am trying to get at the fact, and if you will kindly tell me?
A. He said in this way, the last thing at night to give him with his milk this liquor.
Q. Who said that?
A. Both physicians.
Q. What else?
A. And then they—Dr. Kellerman told me if he had a hemor-

rhage to give him brandy immediately, and then he said to give it to him through the day, through the middle of the morn-
438 ing, and through the middle of the afternoon.

Q. He told you to do that?

A. Yes, sir; or told him to have it. He told both. He told me to give it and told him to have it.

Q. Was Mr. Davy at home at that time sick?

A. Yes, sir.

Q. Stayed at home all the time?

A. Some of the time; not all the time.

Q. But he was not away from you any longer than dinner time?

A. He was at home every afternoon and evening.

Q. About two o'clock?

A. Yes, sir.

Q. What was the form in which Dr. Rae told you to give it to him?

A. Both those same forms. He didn't tell him because he was not his physician.

Q. He didn't tell him?

A. He told me to give it to him. Mr. Davy didn't consider Dr. Rae his physician—didn't have him.

Q. They told him to take liquor with milk or liquor with water?

A. Yes, sir.

Q. Any other form?

A. No, sir.

Q. No other form? They didn't tell him to take raw brandy?

A. I never saw Mr. Davy take that.

Q. I didn't ask that. They didn't tell him to take about one-third of the tumbler of raw brandy at once?

439 A. No, sir; I don't think he ever took it.

Q. They didn't tell him to take about a quart of brandy a day?

A. Of course, they didn't.

Q. They didn't tell him to get intoxicated? Just answer the question.

A. Why, of course, they didn't.

Q. Did you continue to live in Mr. Davy's house for some time after his death?

A. Yes, sir.

Q. For how long?

A. Up to the time of my second marriage.

Q. And then you removed where?

A. I removed before I was married.

Q. Some time before?

A. Yes, sir; about six weeks before.

Q. Where did you move to then?

A. To another house that I had taken, and my father was with me.

Q. Then you were married?

A. Yes, sir.

Q. Did you move again then?

A. Not until we removed to Oswego.
Q. Your husband then came to reside with you?
A. Yes, sir.
Q. Give us as near as you can the date when you removed from Mr. Davy's house.
A. I think I moved in October, the last week of October. I think 1882.
Q. Then you continued to live there until you went to Oswego?
440 A. In the other house you mean?
Q. Yes.
A. Yes, sir; we lived in the York-street house until we moved to Oswego.
Q. When did you move to Oswego?
A. Three years ago this month.
Q. That would be March, 1887?
A. It was three years ago.
Q. You have lived in Oswego ever since?
A. Yes, sir.

(By the COURT:)

Q. When did you last visit Dr. Kellerman with Mr. Davy?
A. In June; the very last week in June in 1881.
Q. How often had you visited him, Mr. Davy, since 1879, when you went there first, and 1881?
A. We went three or four months in 1879, sometimes twice and sometimes three times a month. We always went Saturday afternoons, and that summer he spent his vacation Dr. Kellerman was away and he wrote to Mr. Davy, and then in the fall we went twice regularly every month during that year.
Q. How long did you continue those visits?
A. There was one or two interruptions. He was very sick in September, 1881, with a sprained ankle, and then the following spring, April, 1881, he had another sprained ankle, and both times he was in the house for five weeks, and as soon as he was able to go out he went again.
Q. Then all the time except when he was laid up with a sprained ankle you visited Dr. Kellerman regularly?
441 A. Yes, sir.

Recross by Gov. BEDLE:

Q. You would go to Dr. Kellerman at Kellerman's place in New York?
A. Yes, sir; Dr. Kellerman would not come to Jersey City; he was a consulting physician.
Q. Did he have any local physician in Jersey City?
A. No, sir. May I answer that a little fully?
Q. That is far enough. That is all.

Dr. JAMES H. HUNT, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you reside?
A. At Port Jervis.
Q. You are a practicing physician?
A. Yes, sir; I am.
Q. How long have you been a practicing physician?
A. Eighteen years.
Q. Where have you practiced during that time?
A. Two years at Bellevue Hospital and 16 years in Port Jervis.
Q. Have you some medical institute under your charge at Port Jervis?
A. A surgical institution.
Q. Have you ever been called as an expert in medical cases?
A. Yes, sir.
Q. More than once?
A. Yes, sir.
Q. Now, I want to ask you if alcoholic liquors are pre-
442 scribed for those suffering with pulmonary diseases?
A. Yes, sir; they are.
Q. Do physicians know the danger of those prescriptions?
A. Yes, sir; they are very careful about prescribing alcoholics usually.
Q. Might other diseases be developed or caused by the use of such prescriptions?
A. Possibly.
Q. Did you hear the evidence of Dr. Watson as to the occurrence of convulsions in Mr. William A. Davy?
A. No, sir; I did not.
Q. Have you read his evidence as given on the former trial?
A. I did, sir.
Q. As printed in this book?
A. Yes, sir.
Q. It is substantially the same. You know, then, substantially what his evidence is?
A. Yes, sir.
Q. Dr. Watson testified that when he was called to see Mr. Davy in the morning he was sitting on the side of the bed with his elbows resting upon his knees, leaning forward, with a slop bucket in front of him; he seemed to be very nervous and tremulous. I asked him to show me his tongue; it was with difficulty that he put it out. I noticed that his tongue was bitten in several places. I asked him what kind of a night he had; he said he had been having fainting spells during the night; his pulse was weak and he was bathed in perspiration. I noticed when I was looking in the jar he
443 wanted to know if there was blood in the jar. He then told me that he had been cautioned by his family physician, or that he had been drinking very freely, and then afterwards told me that he had been cautioned by his family physician if he persisted

in having these times that he would have a hemorrhage from his stomach and that that would probably kill him, and he said there is the blood; I suppose it is all up with me now. I tried to get him to lie down; he was rather reluctant about it; did not care to lie down. After he lay down I examined him—that is, I examined over his abdomen and found that it was quite distended, as though there was quite a quantity of gas in the bowels, and while he was in that position, lying down, his eyes wandered around the room a little, and all at once he had what I would term an epileptic seizure; he had a spasm. *Q.* Now, I ask you as an expert physician whether you can say that the spasm or the convulsion was not caused by the disease known as epilepsy.

A. It might have been an epileptic seizure.

Q. Do you think any one can say with certainty and positiveness that it was not?

A. Not without a previons history of the case.

Q. Would not a sudden arresting of the functions of the kidneys produce convulsions?

A. It might have been a uræmic convulsion.

Q. Could any one say in the absence of urinary tests that the convulsions didn't occur from that cause?

A. I don't think they could.

444 Q. Do convulsions ever result from a sudden loss of blood?

A. A sudden and profuse loss of blood.

Q. If there was a profuse loss of blood in this case could any one say that that was not a cause of these convulsions?

A. Not without very careful observations following it—following the loss of blood. It would depend somewhat upon the subsequent history of the case?

Q. How only could a case of convulsions be positively determined in a case like this?

A. By an exhaustive examination of the patient to exclude all other probable causes, and in that way arrive at the cause, by exclusion.

Q. Could it be done safely without an autopsy?

A. I don't think it could. The patient dying immediately after, I should think it would take an autopsy to determine it?

Q. In the absence of a witness—that is, of some one seeing the act of vomiting—is it an easy matter for a physician to determine where ejected blood came from, especially if a person is delirous?

A. If the patient could not explain the source of the blood himself it might be somewhat difficult.

Q. Where might the blood have come from in such a case?

A. Ejected blood might have come from the stomach, lungs, or possibly from the back part of the nose, and swallowed—*i. e*, from the posterior nares.

Q. If the source of the blood is the lungs, will not the person expectorate blood?

445 A. He is very apt to expectorate blood after that for a time.

Q. Is this the case when the blood comes from the stomach?

A. No, sir; the blood comes in the act of vomiting, and after the acts of vomiting cease there is no longer any blood.

Q. What are the different causes which might result in the vomiting of blood?

A. From the stomach?

Q. Yes.

A. The causes are quite numerous.

Q. Name some.

A. It might be produced by a congestion of the stomach, by erosion of the stomach, ulcer of the stomach, cancer of the stomach; anything that obstructs the portal vein or any obstruction to the hepatic artery, as in heart disease?

Q. What proportion of the cases of cirrhosis of the liver arise from the excessive use of alcoholic stimulants?

A. I think that would be rather difficult to answer. A German writer gives a little over one-third of all the cases of cirrhosis resulting from abuses of alcohol. Therwalder, I believe it is. I don't know what the statistics are in this country or in England.

Q. Is it not a fact that malarial diseases will sometimes cause cirrhosis?

A. Yes, sir.

Q. Will or not the use of highly seasoned food sometimes cause cirrhosis?

A. That is given as a cause; yes, sir.

446 Q. Is it not a fact that often no cause can be assigned for its development?

A. Yes, sir.

Q. Is it not a fact that this disease is often observed in young girls or persons who have never used alcoholic stimulants?

A. It has occurred in girls and others who have never used alcohol.

Q. In your opinion, would ten days of excessive use of alcoholic stimulants cause cirrhosis?

A. I don't think it would.

Q. Would ten days' use of liquor once in every year for ten years be likely to develop cirrhosis?

A. I don't think I can answer that question.

Q. Do or not men frequently drink all their lives and present no *system* of cirrhosis?

A. Yes, sir; present no symptoms of cirrhosis, oftentimes.

Q. Is cirrhosis of the liver an inflammation of the connective tissues of the liver?

A. It is not a true inflammation.

Q. What is it?

A. It is a deposit of gelatinous substance upon the minute portal filaments, and extends on the larger portal veins, which substance undergoes formation and subsequent contraction, compressing these filaments and cutting off the supply of blood from the hepatic cells. It extends also around the lobules of the liver and makes compression on them, producing atrophy of the external and

447 fatty degeneration of the internal cells.

Q. Would or would not an intelligent man having cirrhosis of the liver be apt to complain of something during its development? I am not referring now to the sot or demented drinker, but one who at least is sober in the morning. Would there be pain connected with the development of cirrhosis?

A. There usually is—and there might not be much pain—a dull, aching pain in or over the liver.

Q. If you saw in a patient one symptom only of cirrhosis—that is, hematemesis—would you feel warranted, without anything else, in pronouncing that a case of cirrhosis of the liver?

A. No, sir.

Q. How would you diagnose a case to ascertain whether it was cirrhosis of the liver?

A. I would examine his liver to determine its size. I would observe whether the man presented the ordinary symptoms of cirrhosis, wasting of the face and the upper limbs; whether he had any fluid accumulating in his abdominal cavity or swelling of his feet; obtain his history and discover what diseases he had before and what his habits were.

Q. If he had cirrhosis, you mean, one of the symptoms is swelling of the feet and the lower extremities?

A. That is a later symptom following the abdominal dropsical symptoms.

Q. Are or are not delirium tremens characterized by any
448 unmistakable symptoms?

A. Yes, sir; they are generally unmistakable.

Q. What are the symptoms which characterize that disease?

A. A patient after taking liquors to abuse of them becomes delirious. In the first place, he is restless; he has a sickness of the stomach, vomiting, sleeplessness, and then he has hallucinations of hearing and sight, and he is constantly on the move. His hands are going, constantly picking at imaginary things. He is bathed in perspiration usually and his pulse is rapid and feeble.

Q. Do patients affected in that way ask for whisky or anything?

A. They generally don't ask for anything; they are out of their head.

Q. Do they usually die in the first attack?

A. No, sir; not usually.

Q. Do they ask for food and relish that?

A. No, sir.

Q. Might or might not delirium be produced by the onset of some acute disease, as pneumonia or acute Bright's disease or meningitis?

A. Yes, sir.

Q. In such a case would fever be present?

A. Yes, sir; there is almost always fever in an acute disease.

Q. Would or would not a sudden loss of considerable blood produce tremulousness?

A. If the loss was sufficient it would produce great weakness.

Q. Is or is not this condition sometimes produced by fear?

A. Tremulousness, you mean?

Q. Yes.

449 A. Yes, sir.

Q. Did you ever see it in cases of extreme weakness?

A. Yes, sir.

Q. What are the most common hallucinations in sight in cases of delirium tremens?

A. They generally see objects of very great terror—snakes and rats and devils—you may say almost anything that is repulsive.

Q. Suppose the case of a man thirty-five years of age, of industrious and temperate habits, who, two years previous to his death, had taken a severe cold which had settled upon his lungs, and from which he apparently never recovered, who had quite a severe attack of hemorrhage one year previous to his death, which was succeeded by at least two hemorrhages from four to five months afterwards, and was troubled frequently with pain in his chest, with some fever and night sweats, and was advised by his physician to use alcoholic stimulants, and who did consequently use them to a considerable extent, who was thin in flesh, weak, feeble, and debilitated in health, although attending to his daily business, and who in that condition, in the latter part of July, about two weeks before his death, went to Alexandria Bay, a summer resort on the St. Lawrence river, for the purpose of rest and recuperation, and who while there spent his time mainly on the river, in fishing, and being rowed from place to place, sometimes playing billiards in the evening, and who at the same time used daily to a considerable extent alcoholic stimulants,
450 which he had been advised by his physician to take, and who, three days before his death, was found in his room very sick, who complained of his head, and who had been during very hot weather for several days previous part of the time on the St. Lawrence river, and who had vomited considerable blood, and was at times delirious, and who, in his delirium, imagined there was pitch and smoke in his room, and has several attacks resembling epileptic fits, and who slept quietly part of the time during his illness, whose flesh was feverish and at times bathed in perspiration, especially after sleeping, who was thirsty for water, who called for food, and who ate sparingly from such dishes as he relished, but who continued to grow weaker, although his mind was clear, until three days after his sickness he died.

If you were called upon to express an opinion would you pronounce that a case of alcoholism or delirium tremens?

Counsel for defendant objected to the question as irrelevant and too indefinite to be asked of a physician, in that it does not state that the person used a definite amount of alcohol.

(By the COURT:)

Q. I will ask this question. You have read that question over carefully. Is there in it such a clear, distinct, and unconditional statement of facts as will enable you to give an intelligent answer?

A. (The answer of the witness was ordered stricken from the record.)

451 Q. You don't understand my question. I asked you whether there was a sufficiently clear statement in that question of symptoms to enable you to give an intelligent answer.

A. I don't think I can answer the question. I can answer the question much better from Dr. Watson's testimony, wherein he described the symptoms of delirium very much better.

(By Mr. LINN:)

Q. I want to ask the Dr. this, whether he can say what was the cause of death in that case.

The COURT: I think you have a right to ask the question whether the symptoms are such as to enable the witness to answer. The witness in answer to my question says that he cannot form any opinion as to the facts in that question.

Mr. LINN: That may be. The symptoms which this man exhibited were such that a physician without an autopsy could not tell from what he died.

The COURT: If you will accept that as an answer, very well.

Mr. BEDLE: If your honor will allow us an exception.

Exception granted, and the same is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

Q. Would you, if called upon to express an opinion, pronounce that a case of alcoholism or delirium tremens?

A. Not as far as I can judge from that hypothetical question; there is nothing there to give it.

Q. Could you say in a case like that that having those
452 symptoms and those only what the man died from?

A. No, sir; I could not.

Q. Would a post-mortem examination have developed or explained it?

A. It might have done so; probably would.

Q. Are physicians always able to tell with certainty what causes a man's death?

A. They are not always able to be accurate.

(By Governor BEDLE:)

Q. People often died and they don't know what the cause of death is?

A. Certainly.

Cross-examination by Gov. BEDLE:

Q. You could not say from that question put to you that the man died of alcoholism? I understand you to say that.

A. Yes, sir.

Q. And there is not enough in it to tell what he died of?

A. In that hypothetical question?

Q. Yes.

A. No, sir.

Q. You would want some more facts. The quantity of liquor would have a good deal to do with it?

A. It might and might not, unless there is an excessive quantity.

Q. What do you mean by it might not? Would not the quantity of liquor in that question have a good deal to do in diagnosing what was the matter with the man?

A. If the quantity was excessive, of course it would.

453 Q. It is a material fact, is it not?

A. Yes, sir.

Q. And you could not form any opinion without knowing sufficient facts to tell whether he drank excessively or not?

A. I could not.

Q. The fact of his being at a summer resort on the St. Lawrence, at Alexandria Bay, and that he had gone there for rest and recuperation does not influence you a bit?

A. Yes, sir; it might a little.

Q. But you could not tell much from that as to what was the matter with him?

A. I could not make a diagnosis from that fact; no, sir.

Q. You could not tell much from this: "And who at the same time used daily to a considerable extent alcoholic stimulants." You could not form any opinion of that from this paper?

A. I could not without I knew the definite amount of alcoholic liquor measured in quantities.

Q. You physicians try in your practice to get accurate information, do you not, of the history as you have stated?

A. Yes, sir; we do.

Q. And the surrounding conditions, there is nothing more important than that?

A. No, sir; it is very necessary.

Q. And a physician of matured judgment and reasonable experience knows well the importance of all that kind of information in telling what is the matter with the patient?

A. Yes, sir.

Q. On the question of symptoms—there are a good many symptoms standing alone that might be accounted for by various causes. Is not that so?

454 A. Do you use the word symptom in the plural?

Q. Well, I will take it in the singular.

A. No, sir.

Q. I use the word symptom, but I use it in a separate sense. You may find one symptom in a patient that may be attributable in the absence of any others to various causes?

A. I think not.

Q. Fever is a symptom?

A. Yes, sir; of a great many diseases.

Q. It may be traceable to various causes?

A. It may be due to various causes.

Q. Now as to the relation it has to the case depends upon other symptoms, does it not?

A. Yes, sir; and the very nature of fever depends upon other things.

Q. It is not the one symptom you depend upon?

A. That is what I argue, we have to depend upon other symptoms.

Q. It is the relation of symptoms to symptoms in the entirety and the condition of things?

A. Yes, sir; the condition of the whole.

Q. The history of the case. It might be a symptom that, standing by itself, might have come from various causes?

A. A great many.

Q. But if you have it accompanied with other symptoms, as, for instance, if a man has been drinking spirituous liquors excessively, you are bound to look for the cause in that direction?

A. Not necessarily.

455 Q. You are very apt from the history of the case to look for the cause?

A. Not in whisky; not usually.

Q. What do you mean by that?

A. Well, I presume you mean if a man has vomiting of blood from the stomach that I will look for whisky.

Q. I am not talking about vomiting of blood—vomiting.

A. Unless a man uses whisky very excessively I should not regard it very much.

Q. If you found he had been using it excessively you would look in that direction?

A. I would examine it.

Q. If you found after examination that he had been using liquor excessively you would look in that direction for the cause?

A. I would take that into consideration, among other things.

Q. Now, Doctor, I think you said that the sign of delirium tremens were usually unmistakable?

A. Yes, sir; I think they are.

Q. You have cases of delirium tremens?

A. Yes, sir.

Q. How many?

A. I could not begin to tell you.

Q. Are you in a regular practice?

A. Yes, sir.

Q. What is the institute that you conduct?

A. A hospital.

Q. Where?

A. At Port Jervis.

456 Q. I suppose that is a hospital like in most of these cities where doctors are assigned to it from time to time?

A. No, sir.

Q. Is it your hospital?

A. Yes, sir.

Q. A private hospital?

A. Yes, sir.

Q. Paid patients?

A. Yes, sir.
Q. And for general diseases?
A. Yes, sir.
Q. Delirium tremens?
A. Everything that comes along that it is necessary to treat.
Q. You used the word surgical. What do you mean by that; is it principally for surgical cases?
A. No, sir; it rather leans towards surgery.
Q. How long have you been at it?
A. That hospital has been in existence one and a half years.
Q. How many patients have you?
A. I don't know how many.
Q. Half a dozen?
A. Yes, sir; I should think there were half a dozen when I left.
Q. And you run it yourself?
A. Yes, sir.
Q. Now, a physician of experience who is called upon to diagnose a case of delirium tremens would naturally go to work and get a history of the case and the surroundings and what
457 a man had been doing, and if he is a physician of experience in his profession or with the ordinary knowledge of a physician he would be able to tell pretty well whether it is delirium tremens or not?
A. Well, the symptoms of delirium are so remarkably characteristic that a physician ought to be able to determine whether it existed or not.
Q. You would rather trust the judgment of an experienced physician with such a patient than to trust any hypothetical opinion, would you not?
A. Yes; if the hypothetical question did not cover the ground.
Q. You would trust your judgment a great deal better after seeing that patient and finding out about his case than you would any expert's opinion based on any stated facts?
A. I think if all the symptoms were presented to an expert he could tell whether delirium tremens existed or whether they did not.
Q. It is hardly possible for an experienced physician to mistake a case of delirium tremens if he properly examines the case?
A. The symptoms are very characteristic and unmistakable.
Q. Last question repeated.
A. It is very easy to make a diagnosis.
Q. In other words, you are willing to answer that question yes?
A. Yes, sir.
458 Q. Now, you take delirium; you have stated that it might be produced by pneumonia, by Bright's disease, and by meningitis, and some other things. There are a good many causes that would produce delirium?
A. Yes, sir.
Q. A little too much morphine will do it?
A. It will make a man irrational—yes, sir.
Q. That is one of those symptoms that before it is used as an aid

in diagnosing a case you get its relation to the history of the case and the circumstances surrounding it, and to other symptoms?

A. Yes, sir; we make a thorough examination of the case.

Q. You like in all cases to have as many of the symptoms as you can get hold of, and you look to them in the history of the case as very important?

A. Yes, sir; it is.

Q. How long have you been in Port Jervis practicing?

A. 16 years.

Q. Who spoke to you about coming here as a witness?

A. I think Mr. Parker wrote to me.

Q. You have not been in this case before?

A. No, sir.

Q. I don't know that I quite understand you in regard to your opinion as to alcoholism producing cirrhosis of the liver? I don't know that you gave your own opinion about it?

A. No, sir.

Q. You gave the opinion of some one author?

A. Yes, sir.

459 Q. Now, don't you know—you were not here when Dr. Ward was sworn and Dr. Phillips?

A. Not to-day.

Q. You haven't been here at all?

A. I heard a little of Dr. Ward's testimony.

Q. Don't you know that in most of the cases of cirrhosis of the liver it is due to the use of spirituous or alcoholic liquor?

A. I know that some authors make that statement and others do not.

Q. Have you any experience, so that you can form any opinion yourself?

A. I told you I could not form any opinion in regard to it.

Q. The best you can do is to give different authors?

A. To be guided by the text books.

Q. Do you know of anything that will favor the production of diseases as much as alcoholism or alcohol?

A. It is a very common factor in the production of diseases.

Q. I ask you as to whether alcoholism does not favor the production of nearly all diseases? I do not mean now certain specific things, as small-pox, &c., but whether it does not favor the production of nearly all diseases by lessening the power of resisting their cause, and whether it does not contribute to their fatality—the fatality of the disease—by impairing the ability of tolerating and overcoming them?

A. The first sentence I don't agree with at all.

460 Q. I am reading from Dr. Flint?

A. I don't quite understand. I don't think that alcohol favors the production of most all diseases, but it does lessen the vitality.

Q. Whether it does not favor the production of all diseases by lessening the power of resisting their cause?

A. It does.

Q. And whether it does not contribute to their fatality, the fatality of the disease, by impairing the ability to tolerate and overcome them?

A. If used to excess.

Q. Alcohol is looked upon as a poison in the profession?

A. No, sir; alcohol is not, if it is not abused.

Q. Arsenic is a poison?

A. Yes, sir.

Q. And it is good for medicine?

A. Yes, sir.

Q. You know in what sense I mean?

A. If taken in excessive doses or poisonous doses.

Q. Is not the steady use of intoxicating liquors poisonous in itself, and don't you class it, as a physician, as such?

A. No more than any other potent agents might be classed as a poison.

Q. I will ask you whether, in your profession, alcohol is set down as one of the poisons in the classification of poison?

A. It may be. Alcohol is not a narcotic poison itself. I don't think it is classed among the poisons.

461 Q. Do you know whether it is or not?

A. I think I do.

Q. Do you say it is not?

A. There are many classifications. I say it is not, in the correct acceptation of the word poison. I don't think it is classed as a poison.

Q. Have you studied up that question at all?

A. No, sir; I haven't looked at it lately. I haven't looked at my Materia Medica lately.

Q. It would surprise you if it was classed as a poison among some of the others?

A. It might be classed as a poison among some others.

Redirect by Mr. PARKER:

Q. Is the steady, temperate use of alcohol poisonous or destructive?

A. It might be used in some systems many years without producing any appreciable bad effect. Many people do use alcohol.

Q. And to a very great age?

A. Yes, sir.

Q. It is the excessive use of the article that is injurious?

A. Yes, sir.

Q. It is so in a degree even with arsenic?

A. Yes, sir.

Q. And with opium?

A. Yes, sir.

Q. All these things can be used so as not especially to injure health, and they can be used so as to immediately destroy it?

462 A. Yes, sir.

Q. The distinguished De Quincy, the opium-eater, died at some 75 or 76 years of age?

A. I don't remember his age.

Q. In relation to this particular case, what element of delirium

tremens do you find in the statements that have been made here, outside of the allegation of excess in the use of liquor?

A. Mr. Linn read me part of Dr. Watson's testimony. He did not present at all a clear history of delirium tremens, and I should say the man was delirious; but there is no evidence, so far as I have heard, that would point to the disease known as delirium tremens.

Q. You have said in answer to counsel on the other side that importance is due, in making a diagnosis, to the history of the case?

A. Yes, sir.

Q. When you seek that history you are of course careful that it it proceeds from reliable sources?

A. Yes, sir.

(By Governor BEDLE:)

Q. Who was De Quincy, spoken of by counsel—you don't know?

A. No; I don't recollect now.

Mrs. ADA D. WARD, recalled, testified as follows:

Examined by Mr. LINN:

Q. Did you ever see that death certificate given by Dr. Rae or know what its contents was until produced in court?

A. I never have seen it.

463 Q. Did you know what it contained until it was produced here?

A. No, sir; I never knew what it contained until after the first trial.

Q. I omitted to ask you yesterday what kind of a pistol your husband had?

A. A small-sized pistol; it was a pearl handle and silver-plated pistol.

Q. Was that found among his effects after he died?

A. No, sir.

Q. Do you know where that pistol was?

A. Yes, sir; I left it at home with my father when I went away that summer.

Q. Was any pistol found among his effects?

A. No, sir.

Q. What were the habits of Mr. Davy as to the use of tobacco?

A. He was an inveterate smoker—a fearful smoker.

Q. Do you know what he smoked?

A. Yes, sir; very strong cigars.

Q. Do you know how many cigars he smoked in a day sometimes?

A. Yes; sir; I do.

Q. How many?

A. I have known him to smoke over a dozen.

Not cross-examined.

A. C. MATTOON, recalled, testified as follows:

Q. Do you know what Mr. Davy's habits were as to the use of tobacco?

A. I know he was a great smoker.

Q. Do you know what he smoked?

464 A. Heavy cigars, strong cigars.

Q. You say he was a heavy smoker. Can you give any idea of the quantity of time he spent in smoking?

A. He was almost a continuous smoker. I saw him at his office and at his home and while I was in his company.

Not cross-examined.

Dr. WILLIAM H. KATZENBACH, sworn in rebuttal on the part of the plaintiff, testified as follows:

Direct examination by Mr. LINN:

Q. Where do you reside?

A. New York city.

Q. What is your profession?

A. Physician.

Q. How long have you been practicing?

A. I have practiced in New York city 19 years.

Q. What experience have you had; where have you been practicing?

A. I have practiced in New York city; after graduating I was at Bellevue for a year and a half; since then I have been engaged in private practice.

Q. Have you had any experience in the treatment of pulmonary diseases?

A. Yes, sir.

Q. Have you had much experience in cases of delirium tremens?

A. Some experience.

Q. I will ask you the same question which I put to Dr. Hunt yesterday, and in order that you may have it clearly before

465 your mind I will allow you to read the question: Supposing the case of a man 25 years of age, of industrious and temperate habits, who two years previous to his death had taken a severe cold, which had settled on his lungs and from which he apparently never recovered; who had had quite a severe hemorrhage about one year previous to his death, which was succeeded by at least two hemorrhages from four to five months afterwards, and was troubled frequently with pain in his chest, some fever, and night sweats, and was advised by his physician to use alcoholic stimulants, and who did consequently use them to a considerable extent; who was thin in flesh, weak, feeble, and debilitated in health, although attending to his daily business, and who in that condition, in the latter part of July, about two weeks before his death, went to Alexandria Bay, a summer resort on the St. Lawrence river, for the purpose of rest and recuperation, and while there spent his time mainly on the river, fishing and being rowed from place to place, sometimes play-

ing billiards in the evening, and who at the same time used daily to a considerable extent alcoholic stimulants, which he had been advised by his physician to take, and who, three days before he died, was found in his room very sick and complained of his head, and had been in very hot weather for several days previous, in a row-boat, part of the time on the St. Lawrence river, and who vomited considerable blood and was at times delirious, and who in his delirium imagined there was pitch and smoke in his room, and had several attacks resembling epileptic fits; who slept quietly part of the time during his illness, was flushed or feverish at times,
466 and then bathed in perspiration, especially after sleeping; who was thirsty for water, who called for food, and who ate sparingly from such dishes as he relished, but who continued to grow weaker, although his mind was clear, until three days after his sickness he died. If called upon to express an opinion in such a case, would you or not pronounce it a case of alcoholism or delirium tremens?

The same objection is made to the question. Objection overruled and exception allowed to defendant's counsel, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

A. No, sir; not positively.

Q. What are usually the most common symptoms of delirium tremens?

A. The symptoms of delirium tremens when fully established are the occurring of delirium, which may be maniacal.

Q. What is that?

A. Assuming a form of mania, or may be a low muttering delirium. In addition to this, there are tremors, and may be tremors of the extremities—that is, of the hands, of feet, and of the lower extremities. Sometimes there are general tremors—that is, tremors of the whole body. In addition to this, a restive condition; sometimes a brilliant expression of the eyes, sometimes a haggard and continuously restless condition. The patient may be in a condition of almost complete unconsciousness or semi-consciousness—that is, the patient may be aroused from it and talk coherently and
467 sometimes incoherently. In addition to this, there are hallucinations of special senses—that is, of the eyes and hearing; sometimes hallucinations of smell and taste, sometimes hallucinations of general sensibilities.

Q. What are the most common hallucinations?

A. The most common are those of sight—that is, the patient sees objects—most usually human beings or animals.

Q. What kind of animals?

A. He may see vermin, or lice, or dogs, or snakes, or spirits.

Q. How is it with regard to sleeplessness?

A. As a rule, they do not sleep well; sometimes there is apparent sleep, semi-consciousness; sometimes the eyes are closed; oftentimes they are open wide and staring with an anxious expression, an ex-

pression of apprehension, an expression of expectancy; they are usually sleepless.

Q. If sleep does occur what is apt to be the result?

A. Sometimes the attack will terminate by a refreshing sleep, but often while asleep there will be mutterings and startings in sleep, constant jerks.

Q. And if sleep occurs, does or does not the patient usually recover from the attack?

A. If he has a long-continued and undisturbed refreshing sleep he will recover often.

Q. Do patients ordinarily die in the first attack of delirium tremens?

A. Not usually.

Q. In a case of pulmonary complaint do you ever administer or prescribe alcoholic stimulants?

468 A. Frequently.

Q. To what extent?

A. To the extent of tolerance on the part of the patients—that is, we prescribe a sufficient quantity for the patient to feel comfort rather than discomfort from it; that he would feel a beneficial effect.

Q. Are you acquainted with Dr. Flint's practice of medicine?

A. Yes, sir.

Q. Were you acquainted with Dr. Flint?

A. Yes, sir.

Q. Personally?

A. Yes, sir; I assisted him at one time—that is, clinical assistant to him.

Q. Is or is not that work of his a high medical authority.

A. Yes, sir.

Q. Universally recognized by physicians?

A. In this country at least.

Q. Now, I read from this book and ask you whether you recognize this as sound medical authority. I read from the bottom of page 293, "Passing now to consider the remedy," &c. (counsel read from the book). Do you recognize that as sound medical authority?

A. Yes, sir.

Q. And that agrees with your knowledge and experience?

A. Yes, sir.

Q. Have you heard the description of Mr. Davy's condition given by Dr. Watson, of Alexandria Bay?

A. No, sir.

469 Q. In cases of delirium tremens do the patients call for drink? Is that customary?

A. As a rule, no.

The COURT: Do you mean by drink alcohol?

Mr. LINN: Alcohol.

A. They don't call for any form of drink. They express no desire, as a rule.

Q. Do they express a desire for food?

A. As a rule, no.

Q. If a patient suffering from some symptoms of delirium tremens should ask for water frequently, and should ask for food and take it and enjoy it, and should have quiet, peaceful slumbers, what would that indicate to your mind—that the disease was delirium tremens or something else?

A. If it had been delirium tremens, that it was improving.

Q. Or if it had not been, that it was some other cause?

A. Possibly.

Q. Is or is not exposure to the sun sometimes attended with sickness and vomiting?

A. Yes, sir.

Q. Do you know whether such cases occur in the city of persons having been exposed to the sun and having something like sunstroke being taken to be under the influence of liquor?

A. Yes; I think that occurs nearly every summer in New York city. I know in the hospital the first cases that were brought in were brought in by the police as cases of alcoholism, when
470 they were cases of sun-stroke—that is, where they were unconscious.

Cross-examination by Mr. STRONG:

Q. The most satisfactory way to form an accurate opinion, I assume, as to whether a person is suffering from delirium tremens or not is to see the person?

A. Yes.

Q. And the opinion of a reputable person who saw the patient a number of times, assuming that he was a qualified physician, would be much more satisfactory to you than the opinion of a person who never had seen the person at all, would it not?

A. Yes.

Q. If you saw a person suffering from some disorder and manifesting certain symptoms you would not hesitate, would you, in saying that those symptoms were symptoms of delirium tremens?

A. That is, if they were?

Q. Yes.

A. No, sir.

Q. That is to say, the diagnosing of a case of delirium tremens to a qualified physician is a simple matter?

A. Not always.

Q. Is it not in nine cases out of ten?

A. I should say in a large proportion of cases, if you could exclude all other matters.

Q. I am talking of a case of delirium tremens and asking you whether if a physican saw a person suffering from the disorder he could tell easily and unmistakably whether it was delirium tremens or not?

471 A. In a majority of cases, I should say, yes.

Q. Now, the matter of sun-stroke has been alluded to. You

say that the policemen bring people in suffering from sun-stroke and think they are intoxicated, in New York?

A. Yes, sir.

Q. But as soon as a well-qualified physician gets his eye on the individual he is able to determine it at once?

A. Well, no. If the person is unconscious there is difficulty simply from the appearance of the patient.

Q. But if the patient is in a condition to be aroused and is not wholly unconscious, there is no difficulty in the well-qualified physician determining that it is a case of sun-stroke?

A. I think there would be—that is, from the appearance of the person, from simply seeing him.

Q. I am saying that judging from an examination—from an examination there is no difficulty at all to determine it?

A. Not in a majority of cases.

Q. Now, the first thing in a case of delirium tremens is to produce quiet in a patient, is it not?

A. Yes, sir.

Q. So the treatment which is adopted is to administer sedatives, is it not?

A. Yes, sir.

Q. To bring about, if possible, quiet sleep?

A. Yes, sir.

Q. And if sedatives are unsuccessful in producing sleep, and the condition of the patient remains restless, and refreshing sleep is not produced, the condition is likely to be more unfavorable the longer it is prolonged, is it not?

472 A. Yes, sir.

Q. Now, in determining upon a hypothetical case whether a person has delirium tremens or not it is of the utmost importance, is it not, to know the extent to which alcoholic liquors were used?

A. Yes, sir.

Q. In a question which has been put to you the term "considerable" is used. Now, in order to determine whether this man described in that question was suffering from delirium tremens or not is it not necessary for you to know the extent to which he drank?

A. I should like to know in making my diagnosis; yes, sir.

Q. Is it not necessary for you to know the extent to which he drank?

A. Yes, sir.

Q. Are you familiar with what I must describe by a technical term as the science of toxicology?

A. As far as I have read and observed cases of poisoning.

Q. That deals with poisons?

A. Yes, sir.

Q. I want to ask you, now, about alcohol in that connection. Are you familiar and know whether or not alcohol is classed among the poisons?

A. Yes, sir.

Q. And by alcohol I include in that alcoholic stimulants, such as

brandy, gin, whisky, rum; will you tell us whether or not alcohol is not classed among the poisons?

A. It is classed as a poison.

473 Q. The sleep which is necessary in order to promote the recovery of a patient from delirium tremens, I understood you to say, was long-continued, undisturbed, refreshing sleep. That is correct?

A. That is what they look for and expect. Of course that sleep may be interrupted.

Q. That is what you mean to be understood as the kind of sleep necessary to promote a recovery in cases of delirium tremens?

A. Prolonged and undisturbed.

Q. And refreshing?

A. Yes, sir; and refreshing.

Q. You never prescribe alcohol to such an extent as to intoxicate, do you?

A. Under what circumstances?

Q. I mean for ordinary difficulties like pulmonary difficulties.

A. No, sir.

Q. You would think it would be positively harmful to produce intoxication?

A. Yes, sir.

Q. The extent of drinking a quart of raw brandy a day?

A. I never saw a person who would take that much for pulmonary trouble.

Q. You would think that to drink two bottles of liquor between the afternoon of a Sunday and the morning of the following day—

I don't refer to the kind of liquor; one is, say, brandy—would

474 you or not say that that was positively injurious in its effect?

A. Unless the patient were in a condition of collapse and required it.

Q. I am taking the case of an ordinary patient, weak physically and run down, but able to be about. Would you or not think that was a positive injury?

A. I should say it was excessive.

Q. And a positive injury?

A. I should say so.

(By Mr. PARKER:)

Q. The good physician who sees the man is one who has experience of age extending in that class of diseases, is he not?

A. The good physician, yes.

Q. The man whose competency is greater because he sees must be able by experience to determine what he sees?

A. Yes, sir.

Q. The physician in such a case has to depend upon the truth of what is told him to a large extent, has he not?

A. Yes, sir.

Q. And he may come, may he not, to a very great mistake by being deceived by the axaggeration of others?

A. Yes, sir; the physician has to weigh evidence sometimes, frequently.

Q. If the case was one in which the patient spent a night without disturbing his attendant who was with him, his wife, would you not call that a long-continued and refreshing slumber?

A. Yes, sir.

475 Q. If the day before he died he asked for food and took it, what would you regard his state in relation to being the victim of delirium tremens?

A. I have seen persons do that in delirium from other causes. I don't think with delirium tremens.

Q. But suppose there is no delirium.

A. In the absence of delirium and the desire for food certainly shows a clear condition of mind.

Q. Suppose the mind was clear; the person simply weak; that he had for some cause or other lost blood; that he didn't rave; he saw no snakes, nor toads, nor devils, nor anything offensive, what would be your judgment? Is his state symptomatic of delirium tremens or of prostration?

The COURT: The answer is expected to apply merely at the time those symptoms appear?

Mr. PARKER: Yes, sir.

A. The question says that he has not delirium, and then says "if delirious," so that I can't answer it in that way.

(The question was then amended to read as above.)

A. It might be of either; it might not be prostration at all, but if prostration it might be prostration from any cause.

Q. But in the absence of these signs that you have spoken of and called the maniacal signs, does not that go to show that whatever was the matter it was not delirium tremens?

A. There is nothing pointing toward delirium tremens.

Q. How much a man could stand of liquor depends, does it not, upon his experience in taking liquor?

476 A. Yes, sir.

(By the COURT:)

Q. In a case of delirium tremens, after the excitable state of a patient is concluded, is it not followed by prostration?

A. Sometimes.

Q. Is not that a usual symptom?

A. Yes, sir.

Plaintiff rests.

Dr. JOHN W. WARD, recalled on the part of the defendant, testifies as follows:

Direct examination by Mr. STRONG:

Q. Since you were on the witness stand before have you been furnished with a stenographic copy of Dr. Watson's testimony?

A. I was furnished with what purports to be a stenographic copy.
Q. It was furnished by the present stenographer?
A. I received it through the mail.
Q. You have it, but you left it at home this morning?
A. I have it, but I haven't it here. It was written on paper with blue lines and with the stenographer's name at the top.
Q. Knight & Gnichtel?
A. I don't know the name.
Q. Have you read that testimony?
A. I have read it.
Q. Assuming the facts testified to by Dr. Watson to be true, are you able to state what disease Mr. Davy was suffering from at the time Dr. Watson was attending him?
A. I think I am.
477 Q. Have you any doubt in your mind on that subject?
A. I have not.
Q. Now, state just what that disease was.
A. Acute alcoholism.
Q. Is there any other name it goes by?
A. Well, the term acute alcoholism is sometimes confused with delirium tremens; they are not necessarily the same.
Q. The common understanding; I am talking about the common understanding.
A. Yes, sir; it is frequently called delirium tremens.
Q. Are you familiar with the subject of poisons to some extent?
A. I have some knowledge of poisons. I can't say that I am familiar with toxicology; I never made it a special study.
Q. Is not alcohol or alcoholic stimulants, such as brandy, whisky, gin, rum—state whether they are or are not classed with poisons.
A. They are classed as poisons.
Q. And if taken in sufficient quantities by an individual do they not operate as a poison?
A. If taken in large quantities they operate as a poison.

Cross-examination by Mr. PARKER:

Q. And if taken in small quantities—moderate quantities—they operate as a medicine?
A. Yes, sir; and oftentimes a great benefit to the patient.
478 Q. And in that matter they resemble various other things?
A. Yes, sir; other poisons and other things.
Q. Alcohol exists, does it not, in the food we eat?
A. It forms more or less of an important part of the food we eat.
Q. And almost every liquid, except water, contains it? I don't know that it is in water.
A. I think not in water, at least not in Trenton water.
Q. Except when you put it in, and it is called a poison just as a means of nomenclature?
A. Yes, sir; it is classed as a poison.
Q. I think what you have stated in relation to your judgment,

derived upon reading Dr. Watson's testimony, was a repetition of what you stated before?

A. Yes, sir.

Q. The whole thing depends upon the question of extent, does it not? Of course, by that I mean as to whether the doctor was correctly informed.

A. Yes, sir; it depends upon the doctor's information as to the amount of alcohol taken.

Defendant's counsel then offered to read in evidence the testimony of Mr. Mattoon taken at the last trial on which the questions referring to testimony which were put to him on his cross-examination were based, and to which the witness replied, I don't now recollect that those questions were really asked or answered, or words to that effect. No objection being offered, the testimony was considered in the case, and is as follows:

479 "Q. Are you in business?

A. Yes, sir.

Q. What business?

A. Civil justice.

Q. Any other regular business?

A. No other regular business.

Q. And have been for how long?

A. Four or five years.

* * * * * * *

Q. Were you acquainted with Mr. William A. Davy in his lifetime?

A. I was.

Q. For how many years?

A. For the last ten years before his death.

Q. Would that make it from about 1871 to 1881—about that time?

A. No; say from 1873. I first made Mr. Davy's acquaintance in 1873. * * *

Q. Just state what took place then.

A. I said to him, Give your checks to John and we will walk around and get out of this crowd. * * *

Q. You didn't see him, Mr. Davy, after he was taken sick?

A. I did not.

Q. Did you ever see him after that Sunday?

A. I did not alive."

Thereupon counsel for the defendant requested the court to direct a verdict for the defendant, which the court refused, to which
480 refusal the defendant then and there prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The court then delivered the following

Charge to the Jury.

GENTLEMEN OF THE JURY: On the seventeenth day of July, 1878, The Ætna Life Insurance Company of Hartford, Connecticut, the defendant in this suit, entered into a contract with one William A. Davy, of Jersey City, in this State, by which the company agreed, in consideration of the annual payment, to wit, $233.60, to insure the life of Mr. Davy, for the term of his natural life, in the sum of $10,000, the said sum to be paid to his wife, Ada Davy, the plaintiff, within ninety days after due notice and proof of his death. Had this been the entire contract there could have been little or no contention as to the right of the plaintiff in this suit to recover or the obligation of the defendant to pay the sum insured for. There is no dispute that Mr. Davy is dead, nor is there any that due notice and proof of his death were presented to the company more than ninety days ago. But this contract was made by the company and Mr. Davy upon certain expressed conditions, seven in all, which in clear and positive language limit in various ways the rights and obligations of both the contracting parties. It will be necessary for you, gentlemen, to consider, however, only one, or, to speak more accurately, only part of one of these conditions. It is the third,
481 as you will find them numbered in the body of the policy or contract, which you will have before you. In that condition you will find these words: "If the insured shall become so far intemperate as to impair his health or induce delirium tremens this policy or contract shall become null and void." In other words, so far as this suit is concerned, the contract between the Ætna Life Insurance Company and Mr. Davy was this: For the consideration of the sum of $233.60 to be paid by Mr. Davy to the insurance company annually during his life that company insured his life for ten thousand dollars, upon the expressed condition, nevertheless, that if Mr. Davy became so far intemperate as to impair his health or became so far intemperate as to induce delirium tremens, then and in the case of the happening of either of these alternatives the contract became null and void, and the company would be liable no longer under it. Practically, then, it is this contract so stated which the plaintiff is seeking to enforce here, and it is upon the very words of this contract that the defendants base their claim to be exempted from liability. For having refused to pay to the plaintiff the amount insured upon her husband's life, ten thousand dollars, the alleged, by way of complete justification of this refusal, that the insured, Mr. Davy, has violated the condition which I have read; that he
482 had since the making of this contract, in fact, become "so far intemperate as to impair his health, or that he had become so far intemperate as to induce delirium tremens."

These alternative accusations embrace the whole defense in the case. As I understand that defense, the insurance company has undertaken to prove violation by Mr. Davy of both of these branches of the contract; in other words, that he did become so far intemper-

ate as to impair his health, and that he did become so far intemperate, also, as to induce delirium tremens. If the company have satisfied you that he has done either one or the other—that he has become so far intemperate as to impair his health or by his intemperance has induced delirium tremens—a complete defense to this suit has been made, and your verdict would be for the defendant. If, on the other hand, the plaintiff has satisfied you that neither of these clauses of the condition has been violated or broken by Mr. Davy, or if the defendant fails to satisfy you that they have been so broken, then your verdict will be in favor of the plaintiff.

I think it proper, before I call your attention to the evidence which has been given—and which I shall do very briefly—to explain as clearly as I can what is meant by the words "so far intemperate as to impair health or induce delirium tremens." I think the plain meaning of the words excluded the idea of habitual intemperance. The words are not, as in many policies, "become habitually intemperate," and which have received judicial construction, but the measure and the degree and the continuance of the forbidden
483 intemperance is found in the words "impairment of health" or "inducement of delirium tremens." Mr. Davy agrees that he will not become so far intemperate as what? Why, become so far intemperate as to impair his health, or so far intemperate as to induce delirium tremens. If impairment of health or if delirium tremens is caused by or followed his intemperance, then the degree of intemperance which has been forbidden by this condition has been reached. Thus you will perceive that if a single debauch, lasting for a period of a few days or it may be a single day only, result in the impairment of health or in delirium tremens, it will be clearly that intemperance which is positively forbidden. In other words, it is the effect and not the duration of the intemperance which the condition has special regard to, and such is the practical construction given to this very clause by the Supreme Court of the United States in this very case, when it was before them for review, after a verdict had been obtained by the plaintiff in this court.

Mr. Justice Harlan, in delivering the opinion of the Supreme Court, says: "The court (meaning the circuit court for the district of New Jersey) said that 'the words of the condition are to be explained according to the common and popular acceptation of their meaning; in this sense of them a single excessive indulgence in alcoholic liquors is not intemperance, but there must be such a frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence.'"

484 In commenting on this construction Mr. Justice Harlan says: "This construction of the contract is in our judgment erroneous. If the substantial cause of the death of the insured was the excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance within the meaning of the words 'so far intemperate as to impair health,' although he may not have delirium tremens, and although previous to his last illness he had not indulged

in strong drinks for such a long period of time or so frequently as to become habitually intemperate."

Bearing this construction in mind that it is the result of the intemperance and not the duration of the intemperance with which the condition in question deals, let us hastily glance at the evidence which it is in your province only to consider and weigh. Mr. Davy arrived at Alexandria Bay on Saturday, July 22, 1881, in the evening, and was met by Mr. Mattoon and others. He went directly to the Crossman House, where he was boarding or intended to board during his visit. He was apparently suffering, according to some of the witnesses, from a sprained ankle, and walked with a shuffling gait. Soon after supper he retired to his room. There seems to be no very direct but some contradictory evidence as to his apparent health at this time. It nowhere appears, as I remember the testimony—of course you will correct me if in this respect I am wrong—that he was under medical treatment at that time, or that he was afflicted with any special disease or complaint. At all events, his
485 health was sufficiently good to enable him to walk over to the Thousand Island House on Sunday following his arrival to call upon Mr. Mattoon, and he spent some time there smoking and conversing. On the same day he was in sufficiently good health, according to some witnesses, to go out upon the river and remain there some hours with William White. He was also sufficiently strong, as it is admitted, to play billiards with Mr. Mattoon on several consecutive evenings, the games lasting from thirty minutes to more than an hour. On Monday, after he arrived, and on every day succeeding, except Sunday—the second Sunday—he was out on the bay or river fishing or boating until Tuesday, the second day of August, or Wednesday, the third day of August—I am unable from my reading of the testimony to fix which was the last day he was on the river.

Mr. PARKER: Monday, clearly.

The COURT: Either Monday or Tuesday.

Mr. PARKER: I think Monday was the last day by common consent.

The COURT: It is immaterial; I may have overlooked that, but the jury will remember.

On Wednesday, August third, he was found early in the morning in his room in the Crossman House, apparently prostrated by an attack of severe illness, which rapidly grew more and more severe, until Saturday, August sixth, about half past three in the afternoon, he died.

This seems to me, as I remember the evidence, what might
486 be called undisputed, uncontradicted facts. The great contention in the case commences just at this point: What was the cause of that illness and presumably the cause of his death?

The first clear and precise statement upon this point comes from Dr. Watson, a physician at Alexandria Bay, who was immediately called in to treat Mr. Davy professionally upon his illness being made known to the parties in charge of the hotel. Dr. Watson says

in effect that this was the condition of affairs when he first entered the room of the hotel where Mr. Davy was: "Mr. Davy was sitting upon the side of the bed, with his elbows resting upon his knees, bent forward a little: his hands were somewhat streaked with blood; there was some blood upon his garments; the slop jar was in front of him; he had been vomiting blood and probably other matter. The blood was that blood which comes from the stomach. He was very tremulous; he was in a tremor when I went in. I spoke to him two or three times to ascertain what was the matter with him; his tongue was bitten in two or three places. I asked him what kind of a night he had had and he said he had passed a very bad night; he said he had been having what he termed a bilious attack, and that he had been taking pills. After looking at the blood in the bucket I called his attention to it; he said he saw it and that he had been cautioned by his family physician that if he persisted in having these little times in drinking that he might be expected to have hemorrhages of the stomach some time. He said he supposed it was all up with him now.

487 While the doctor was in the room Mr. Davy commenced suddenly to stare, became tremulous, and went backward into a fit of epileptic seizure. In talking with Mr. Davy his mental condition was such that you could collect him so that he would converse coherently for awhile. The moment the conversation ceased his mind would wander. He was very nervous and excitable. His nervousness was manifested by delusions which he had, more of hearing than of sight." To this statement of Dr. Watson you must add the statement made by Dr. Bruce, who described Mr. Davy's condition in this way: "He seemed to be in a dazed condition. He imagined various things; that the room was full of smoke, and that there was pitch in the air; that he seemed to be spending his time in trying to collect this pitch in the air and throwing it on the floor. He would reach for the pitch, and there seemed to be things in the air that he was trying to pull down. He would collect it in his hand and make a motion to throw it on the floor. He spoke of a heavy tube lying across his body, and he was anxious to have it removed;" that he sat up in bed and went through the same movements that Dr. Bruce went through—movements to remove the tube to satisfy Mr. Davy—and as soon as he went through these movements Mr. Davy was satisfied and laid down contentedly.

Certainly these were peculiar symptoms and actions and unmistakable ones. Certainly no medical expert has testified to you that they were symptoms of lung disease or cirrhosis of the liver.

488 What disease did they indicate? Dr. Watson says that in his opinion the case was one of nervous irritation caused by the use of alcoholic spirits, and that the cause of Mr. Davy's death was this excessive use of alcoholic spirits. The doctor saw Mr. Davy three or four times on Wednesday and three or four times on Thursday. On Friday Dr. Rae arrived and took charge of the case.

I want to call your attention at this point to the statement made by Mrs. Davy as to the condition of Mr. Davy when she arrived at Alexandria Bay on Thursday before he died. She says that he was

very weak and very much prostrated; perfectly conscious, rational, and remained so until just before his death; that he had a sinking fit and became much weaker thereafter on Thursday night. It is for you to say, gentlemen, whether this statement in any way contradicts the statement made by Dr. Watson, Dr. Bruce, and the other witnesses of Mr. Davy's condition at that time, or whether, when Mrs. Davy arrived, Mr. Davy had not already fallen into that state of weakness or prostration which, as Dr. Katzenbach told us, always follows *as* an attack of delirium tremens.

The next evidence I call your attention to is the certificate of Dr. Rae. Dr. Rae you saw here upon the witness stand. He is apparently an intelligent and well-read physician. He attended Mr. Davy professionally up until a short time before his death. He was sent for by Mr. Davy and he hurried from Jersey City to Alexandria Bay to answer the appeal for his services. He says that when
489 he first saw Mr. Davy, in his opinion, he was a dying man. He did what he could for him, I suppose, although I do not remember any particulars of his treatment, but what he did was without result. Mr. Davy died just about the time that Dr. Rae left for his home on the next day. As his attending physician, when proofs of death had to be sent to the insurance company so as to get the amount of insurance, Dr. Rae gave a certificate of the direct cause of death, in his opinion; that certificate is sworn to and is in evidence. I call your attention in this part of the case to the third question in that certificate: "Was his last illness occasioned or had his general health been impaired by any pernicious habit? He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health."

Now, gentlemen, as a matter of law, I charge you that this certificate is not to be taken or accepted by you as conclusive evidence of the truth of the facts therein stated, nor is the plaintiff bound by this statement or estopped from proving to your satisfaction a different cause of death. It is entitled to the weight which you would give an opinion of a learned physician as to the cause of his death who saw the person spoken of shortly before his death and who had personal knowledge of the person for some time previous to his death. Especially must that weight be given to this statement when, as in this case, the person who made the certificate, Dr. Rae, testifies before you that he adheres now to the opinion he expressed in that paper.

490 Now, some criticism has been made on the word "probably" in that certificate. I will read it again: "He was in the habit of using stimulants and a deal of tobacco; probably they impaired his health." You must, of course, put a construction on that word "probably," and that construction must be such as would suggest itself from the usual and common meaning of the word. The word "probably" suggests a "judging of facts" in the "light of experience." You see a dark, heavy mass of clouds arising rapidly in the skies on an oppressively warm day; from out of the black and seething mass flashes continuously the vivid, blinding lightning and you say there will probably be a thunder storm; judging from what you

see, aided by past experience of approaching storms, you think it more likely that there will be a thunder storm than there will not be a thunder storm. The evidence of a coming storm, in your opinion, is weightier and more certain than the evidence of coming pleasant weather, and you use the word "probably" to express your conviction. I think it will be safe for you to assume that Dr. Rae used the word in this sense. That is for you to judge, however; but if you adopt what I think is the plain meaning of that word, what he said in his certificate then would be this—to paraphrase it—that, in his opinion, Mr. Davy's use of stimulants more likely impaired his health than that they did not impair his health. The evidences of impairment of health, as judged by his experience, were weightier
491 than the evidence of non-impairment. But I do not intend to bind you in your judgment in any way as to what this certificate means by my criticism. It is your province and yours alone to weigh its contents and to allot to it its proper weight and effect.

I next call your attention to the testimony of Dr. Ward and Dr. Phillips. They know nothing of this case personally; they have no connection with it; they are merely here as experts—that is, they are gentlemen who have, or rather are supposed to have, more extensive and thorough knowledge about special matters than the rest of us can have. Thus, a lawyer is, or ought to be, an expert on purely legal questions; a physician on medical questions; a builder upon the erection of houses, and a surgeon upon matters pertaining to surgery. In this case a question was submitted to Dr. Ward and Dr. Phillips which practically embraced the apparent symptoms of disease exhibited by Mr. Davy, together with a statement of his use of alcohol based upon the statement of certain witnesses in this case produced by the defendant, and they were asked, "Assuming the symptoms to have been truthfully described and the use by Mr. Davy of alcohol be in accordance with the facts, what disease was he suffering from at the time spoken of by Dr. Watson and of what did he die?" The answer was acute alcoholism or delirium tremens. Now, gentlemen, this is a mere opinion on the part of these physicians, but that opinion is entitled to, and should be given, such weight as you, under the evidence of the case, think it should have. I call your attention to it as corroborative of the opinion ex-
492 pressed by Dr. Watson as to the nature and character and cause of the fatal disease which ended Mr. Davy's life.

I now call your attention to another class of testimony bearing upon this question of delirium tremens as the result of an excessive use of alcoholic liquors. The defendants have, as they claim, placed before you by witnesses a photographic picture of Mr. Davy's life at Alexandria Bay during the last few days of his life. Starting with the admitted facts that Mr. Davy was accustomed to a constant use of alcoholic spirits, the defendants claim they have proved to you just such an excessive use in August, 1881, as would naturally result in the impairment of health or in the inducement of delirium tremens. They rely on the testimony of Benson, Comstock, Lear, Duryea, Duclone, Sykes, Dale, Ford, White, Hunt, Gibson, Albert Root, James Root, Senecal, and a number of others. I

shall not comment upon this evidence at all. It has been heard by you thoroughly, patiently, and attentively. These witnesses have certainly testified to a course of conduct on the part of Mr. Davy wholly inconsistent with the idea of a temperate use of liquor by him.

Some of these witnesses have been contradicted in minor parts of their story by witnesses of the plaintiff; others seem to be, as I remember the course of the evidence, entirely uncontradicted. It is solely your province to pronounce judgment on the weight and efficacy of that testimony. If it be true and you believe it, it
493 must go far towards satisfying your mind as to the cause of Mr. Davy's death. If you judge it to be untrue, if you fail to give it that belief which you must do to entitle you to accept it, and if your judgment is based upon sound reason and not upon impulse or sympathy or prejudice, then you will doubtless reject it. It is my duty to call your attention to this fact: that the only evidence of undue or intemperate use of liquor by Mr. Davy comes from those who were associated with him at Alexandria Bay. No neighbor, no business associate, no intimate friend has been found to breathe the least whisper of the intemperate use of liquor by him, and you must also remember that several witnesses on this subject produced by the plaintiff testified that no sign of intoxication was ever seen by them during a period of many years. This testimony is given by the family, his relatives, by those who count themselves his friends, his associates at home and at Alexandria Bay, and who say they are familiar with his habits of life; and yet you will call to mind this fact, that almost all the plaintiff's witnesses spoke of the constant use by Mr. Davy of alcoholic liquors. One of the plaintiff's witnesses spoke of his habit in previous years at Alexandria Bay; that it was his custom always to take a bottle or flask of brandy with him on the river, and another, his own brother, testified upon cross-examination, in answer to the question whether he has ever seen Mr. Davy intoxicated, that he had seen him when he had evidently been drinking, and he was known as a drinker. It is for you to say what those answers mean in connection with
494 the question which was put to the witness.

All this must be taken into consideration by you, gentlemen, as testimony in the case, and, weighing it with the testimony of the witnesses for the defense, you are conscientiously to answer which allegation had been successfully established. Does the testimony satisfy you, taking it altogether, that Mr. Davy became so intemperate in the use of alcoholic spirits as to impair health, and did he, at Alexandria Bay, in 1881, indulge in the use of alcoholic liquor to such an extent as to induce delirium tremens? If so, the defendant is plainly entitled to your verdict. If, on the other hand, the testimony does not so satisfy you or if you are convinced that all the liquor which he used was used in good faith, under medical advice and for medical purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff.

In weighing this testimony I desire you to be guided by two principles which control in this case, and the first is this: That the bur-

den of proof is upon the defendants in this case—that is, the obligation is upon them to prove the fact relied upon — them as a defense. The plaintiff is not called upon to prove that these facts did not exist, but the defendants are to prove that these facts did exist. It is their duty to present to you evidence which is to satisfy your mind. Such evidence need not be so convincing as to make the effect beyond reasonable doubt, but the weight of the testimony must decidedly preponderate on the side of the defendant.

495 The other principle is this: You are to be governed, as I have said, by the weight of evidence. Now, the evidence in the case is of two kinds, positive and negative, and you must distinguish between them. If a number of creditable witnesses have testified that they have frequently seen a party intoxicated or visibly under the influence of strong drink, their testimony is not to be rejected because an equal number of like creditable witnesses testify that they never saw the party in such a condition. The testimony in the one case is positive, in the other case it is negative, and both statements may be true. The witnesses for the plaintiff say that they never saw Mr. Davy intoxicated or so under the influence of liquor as not to be able to attend to his business. This testimony of itself does not negative or overcome the positive testimony of those who declared, under oath, that they had seen him intoxicated. You must weigh the testimony as a whole, and let the result of your deliberations be such as commends itself to sound reason and conscientious judgment.

There is another branch of this case to which I will refer for only a moment. If you believe Mr. Davy by use of liquor did not bring on an attack of delirium tremens at Alexandria Bay, yet if you believe his use did in any perceptible degree impair his health, the condition of this policy is broken, and your verdict must be for the defendant, with this reservation: It is in evidence that Mr. Davy did take alcoholic stimulants under medical advice. If his taking them was only under such

496 advice and only in such quantities as prescribed by physician, even if impairment of health followed, yet the policy would not become void. Dr. Rae in his certificate and Dr. Watson in his testimony said Mr. Davy had cirrhosis of the liver, a disease which, in a large majority of cases, as has been testified to, is produced by the use of alcohol, and which, as I understand it, is necessarily fatal unless speedily checked. It is certainly an impairment of health. If from all the testimony in this case you conclude that Mr. Davy's condition in this respect was produced by a strict, fair, and *bona fide* following of Dr. Kellerman's prescription, then that impairment of health, if there was any, which it is alleged existed, known as cirrhosis of the liver, does not avoid this policy. That prescription was, as Mrs. Davy gives it to us, to take an egg with sherry wine in the morning and a milk punch before retiring at night and brandy and water, if he needed it, during the day. I leave it entirely with you to say whether, if you believe the witnesses of the defendant and some of the witnesses for the plaintiff as to the habit of Mr. Davy in the use of intoxication liquor for many years

prior to his death, you can conscientiously say and declare that such was a *bona fide* following of medical advice; otherwise the condition is broken if the impairment of health follows.

At the conclusion of said charge his honor disposed of the requests to charge which had been submitted to him at the close of the testimony, and before counsel for the respective parties proceeded
497 to sum up the case as follows:

The COURT: I have some requests to charge. The first is a series of requests made by the counsel for the plaintiff:

"1st. The substantial issue in the cause is upon the last plea, which is, Did Mr. Davy become so far intemperate as greatly to impair his health and induce delirium tremens?"

I have looked carefully at the last plea, and it sets forth this: that Mr. Davy was so far intemperate as to impair his health and induce delirium tremens. That is not the condition of the policy. The condition of the policy is that he shall not become so far intemperate as to impair his health or induce delirium tremens. Either the one or the other would avoid the policy, and I will permit the defendant at this stage of the case to amend that plea so as to change the word "and" to the word "or," the word evidently being put there by oversight, and the defendant ought not to be affected by that kind of mistake. With that amendment I decline to charge that request.

Mr. PARKER: If that amendment is made the plea is bad for duplicity.

The COURT: I would then allow them to interpose a second plea and set up the second branch of the defense. The second request is:

"2nd. Under the evidence the issue is, Was the disease which killed him alcoholism?"

I decline to charge that further than that you ought to gather from all the testimony in the case what was the cause of death.
498 Thereupon the defendant prayed an exception to the words "you ought to gather from all the testimony in the case what was the cause of the death," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"3rd. This is a question wholly for the jury upon the evidence in the case."

I charge that, with this addition: The question is wholly for the jury upon the evidence in the case under the instructions as to the legal questions given by the court.

Thereupon the defendant prayed an exception to said request as charged, and especially to the words "this is a question wholly for the jury upon the evidence in the case," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"4th. The burden of proof is upon the defendant."

I have so charged you and so charge you now. The burden of proof is upon the defendant; they must satisfy you that the defense has been made out.

Thereupon the defendant prayed an exception to said request as charged, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

499 "5th. They must satisfy the jury of the truth of their plea."

I suppose that it is practically the same; it is that the jury must be satisfied of the truth of the defense. That is practically included in the other charge, that the burden is upon the defendants. They must satisfy the jury of the truth of their defense.

Thereupon the defendant prayed an exception to said request as charged, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"8th. If those opinions (of physicians) are founded on testimony giving what is called the history of the case, the jury must determine whether that history is true. Therefore, if the jury do not credit the story of William White and Andrew Duclone, whose relation is stated to have been given to Dr. Watson, the jury have the right to reject his diagnosis; and they have the right anyhow if they do not confide under all the evidence in his skill and experience in cases of this sort."

The first part of that charge — that these opinions are founded upon testimony giving what is called the history of the case, and you must determine whether that history is true. You must determine whether the facts upon which the hypothetical questions are based have been proved or not to your satisfaction. I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis.

500 Thereupon the defendant prayed an exception to the words "I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

I also charge as follows:

"9th. If the jury should believe that the efficient, controlling cause of the death of William A. Davy was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medical purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens."

Thereupon the defendant prayed an exception to the said request

as charged, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

I also charge as follows:

"10th. Whether the health of William A. Davy was impaired by the use of alcoholic stimulants not taken in good faith for medicinal purposes or under medical advice is a matter to be determined by the jury under all the evidence."

501 Thereupon the defendant prayed an exception to the charge of said request as charged, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The COURT: I am also asked by the defendant's counsel to make the following special charges:

"2nd. The expression of the policy 'become so far intemperate as to impair his health or induce delirium tremens' does not mean habitual intemperance or the injurious addiction to alcoholic liquors."

The court refused to charge in accordance with said request otherwise than already charged; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"8th. If the jury believe that said Davy after the delivery of the policy had delirium tremens, induced by intemperate use of alcoholic liquors, the policy is void, except as therein provided."

The COURT: I add to that, provided that said use was not under medical advice and for medical purposes only, and with that condition I charge that to be the law.

To this refusal to charge as requested and to this addition the defendant thereupon prayed an exception, which was allowed,

502 and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"9th. If the jury believe that the intemperate use of alcoholic liquors by said Davy at Alexandria Bay in 1881 resulted in impairing his health in any degree the policy is void, except as therein provided."

The COURT: I make a similar charge and add to that charge, If the use of the liquor was not under medical advice and for medical purposes only.

To this refusal to charge as requested and to this addition the defendant thereupon prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"10th. If the jury find that the illness of William A. Davy at Alexandria Bay, in the summer of 1881, which resulted in his death, was occasioned by the intemperate use of alcoholic liquors the policy is null and void, except as therein provided."

The COURT: It seems to me that the objection to all of these requests is that they should have included the words "Not under medical advice or for medical purposes." If the intemperate use of liquor caused his death, if it was not taken under medical advice or for medical purposes, of course the condition is broken.

503 To this refusal to charge as requested the defendant thereupon prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN. [L. S.]

I will consider the next two requests together:

"11th. If the jury find that the illness of William A. Davy, at Alexandria Bay, in the summer of 1881, which resulted in his death, was not occasioned wholly by the intemperate use of alcoholic liquors, but that the intemperate use of the same contributed to said illness and to that extent impaired his health, the policy is null and void, except as therein provided.

"12th. If the jury find that the said William A. Davy drank alcoholic liquor at Alexandria Bay to the extent testified to by the witnesses for the defense, and that such drinking of the same was intemperate and the effect thereof was to impair his health to any degree or induce delirium tremens, the policy is void, except as therein provided."

The COURT: The 11th request I decline to charge as stated, but in the 12th strike out the words "in any degree," and I so charge you.

504 Thereupon the defendant prayed an exception to the refusal to charge the 11th request as stated and to the modification of the 12th request by the striking out of the words "in any degree," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"13th. If the jury believe that the said Davy was not habitually intemperate or injuriously addicted to the use of alcoholic liquor, yet if the intemperate use of alcoholic liquors by said Davy at Alexandria Bay in the summer of 1881, notwithstanding such use may have been exceptional, impaired his health or induced delirium tremens, the said policy is null and void, except as therein provided."

The court refused to charge in accordance with said request, except as already charged on that subject; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"14th. In considering the question whether Davy, after the issuing of the policy, became so far intemperate as to impair his health or

induce delirium tremens, the jury must render a verdict for the defendant, even though they should find that Davy was not in the habit of using or injuriously addicted to the intemperate use of alcoholic liquors, if they are satisfied that said Davy impaired his health or induced delirium tremens by any—even a single occasion
505 of intemperate use of alcoholic liquors."

The court refused to charge the jury in accordance with said request, except as already charged on that subject; to which refusal the defendant prayed an exception, which was allowed, and that it be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"15th. The jury need not consider the question whether the alleged intemperance amounted to a habit or injurious addiction on the part of Davy, but only the question whether by the intemperate use of liquor, even though it was by a single act or rare and exceptional use, his health was impaired and delirium tremens induced."

Thereupon the court refused to charge the jury in accordance with said request, except as already charged on that subject; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. GREEN, *J.* [L. S.]

"16th. The paper entitled 'physician's certificate,' made by Dr. Rae and furnished by the plaintiff to the defendant, is *prima facie* evidence that the said William A. Davy was in the habit of using stimulants, and probably they impaired his health."

The COURT: It is not *prima facie* evidence. It must be taken
506 into consideration with the other evidence, and I have told you what weight should be given to it.

Thereupon the defendant prayed an exception to the refusal to charge as requested and to the words "it is not *prima facie* evidence," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"17th. That said paper having been introduced as evidence on behalf of the plaintiff, taken in connection with Dr. Rae's testimony, establishes that the said William A. Davy was in the habit of using stimulants, and that they probably impaired his health."

The COURT: It is a question solely for the jury, and they must determine what the paper and the evidence amounts to. It is not for the court to lay down what the evidence means; it is your province alone.

Thereupon the defendant prayed an exception to said charge and to the refusal to charge as requested, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"18th. The burden of explaining or correcting said certificate rests on the plaintiff."

The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

507 "19th. In order to overcome the statements in said certificate by a correction or explanation of the same the plaintiff must establish to the satisfaction of the jury by a preponderance of evidence that Dr. Rae was mistaken in his statements therein, and in determining said question the evidence of Dr. Rae that he adheres to the statements contained in it and the evidence offered by defendant tending to confirm the statements of Dr. Rae therein must be taken into consideration, and unless the plaintiff overcomes said certificate of Dr. Rae, as well as the defendant's testimony supporting it, by a preponderance of evidence the plaintiff has failed to correct or explain said certificate."

The COURT: I decline to charge that except as I have charged you originally upon the weight of evidence, to wit, the weight of evidence in this case is upon the defendant.

Thereupon the defendant prayed an exception to the refusal of the court to charge as requested, and to said charge, and especially to the words "the weight of evidence in this case is upon the defendant," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"20th. As a matter of law, upon the undisputed facts in the case there can be no recovery for the full amount of the policy."

The COURT: If I were to charge that what use would there
508 be for the jury? The court is not here to determine the facts, but simply to lay down the law. The facts are for you to weigh and determine.

Thereupon the defendant prayed an exception to the refusal to charge as requested and to the said charge, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

I will consider the next two requests together:

"21st. If the jury believe the evidence of White, Duclone, Dr. Watson, and Dr. Bruce as to what occurred at Alexandria Bay in the summer of 1881 there can be no recovery for the full amount of the policy.

"22d. There is nothing in the case to justify the jury in disregarding the evidence of White, Duclone, Dr. Watson, and Dr. Bruce."

The COURT: The same objection applies to these requests, Nos. 21 and 22, as to No. 20. It is calling upon the court to weigh this evidence. I decline to charge that simply because it is your duty to weigh the evidence. If, after weighing the evidence, you are satisfied with it undoubtedly your verdict will be for the defendant; but

if you are not satisfied with it your verdict will be for the plaintiff. I cannot charge what the jury ought to do with the testimony.

Thereupon the defendant prayed an exception to the refusal to charge as requested by the 21st and 22d requests and to said
509 charge, and especially the words "if you are not satisfied with it your verdict will be for the plaintiff; I cannot charge what the jury ought to do with the testimony;" which was allowed, and said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"23d. If the jury believe the evidence of Dr. Watson, Dr. Bruce, and the evidence of Dr. Rae in connection with his certificate, there can be no recovery for the full amount of the policy."

The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and the said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"24th. There is nothing in the case to justify the jury in disregarding the evidence of Dr. Watson, Dr. Bruce, and the certificate of Dr. Rae, or either."

The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The COURT: In regard to requests Nos. 23d and 24th, they are matters for the jury and not for me.

"25th. If the jury believe the evidence of Dr. Watson, Dr. Bruce, and White, there can be no recovery for the full amount of the policy."

510 The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"26th. There is nothing in the case to justify the jury in disregarding the evidence of White, Dr. Watson, Dr. Bruce, or either."

The COURT: The whole matter is in the hands of the jury.

Thereupon the defendant prayed an exception to the refusal to charge as requested and to said charge, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EWD. T. GREEN, *J.* [L. S.]

"27th. There is nothing in the case to justify the jury in finding that the quantity of liquor which Davy, on the undisputed testimony, drank at Alexandria Bay in the summer of 1881 was taken in good faith for medicinal purposes."

The COURT: I refuse to charge that stated in that way, but I do charge you this way: There was nothing in the case, so far as I remember, to justify the jury in finding that the quantity of liquor

which Davy, according to the evidence of some witnesses, drank at Alexandria Bay in the summer of 1881 was taken in good faith for medicinal purposes.

Thereupon the defendant prayed an exception to refusal to
511 charge as requested and to the modification thereof, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"28th. The certificate of Dr. Rae must be overcome by the plaintiff to justify a recovery as claimed."

The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and that the said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"29th. To establish a breach of the condition of the policy, 'become so far intemperate as to impair his health,' it is not necessary to satisfy the jury that his health was impaired to the extent of causing death."

The court refused to charge said request, except as already charged; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

"30th. The proof of the physician (Dr. Watson) who attended the deceased in his last illness and of others immediately around him is so positive and so free from contradiction that it is difficult to conceive how the breach of the condition in the policy could be proved if it is not proved in this case."

The court refused to charge said request; to which refusal
512 the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The COURT: That is a matter solely for you. I decline to charge it as a matter of law.

"31st. In view of such of the evidence as cannot be judicially disregarded, but which must be accepted as true, it is the duty of the court to say that a verdict for the plaintiff for the full amount of the policy cannot be maintained."

The court refused to charge said request; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The COURT: It requires the court carefully to take into consideration and weigh all the evidence produced. If I should do that, I would usurp your right and infringe upon your duty, and I decline to do it.

"32d. The evidence on the subject of the general habits of the deceased, from which witnesses testifying that they had never seen him intoxicated, being of a negative character, cannot outweigh the positive evidence as to the intemperate use by Davy of alcoholic liquor at Alexandria Bay in the summer of 1881."

513 The court refused to charge said request except as already charged; to which refusal the defendant prayed an exception, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The COURT: I have stated that the positive evidence of intoxication is not to be rejected because testimony of equally creditable witnesses was to the effect that they did not see him intoxicated. The positive testimony is to be weighed and taken into consideration by you, notwithstanding the other statement. Both statements may be true. You can readily see that the witnesses may have seen him at different times and under different circumstances. Some witnesses testify positively as to what is within their knowledge, that he was intoxicated, and they who say that they never saw him intoxicated do not, by that statement, say that he never was intoxicated, only that they never saw him intoxicated.

I am requested further to charge:

"32d. There is nothing in the case to justify the jury in finding that Davy, in the summer of 1881, had a sun-stroke."

The COURT: You will remember that counsel in summing up for the plaintiff alluded to certain symptoms, which were proved, which he claimed were evidences of a sun-stroke. There certainly has been no one who testified here that Mr. Davy had a sun-stroke, in

514 those words, but you are the judges of the evidence, as I have stated before, to say whether he was suffering from exposure to the sun or sun-stroke or whether he was suffering, as the other witnesses testify, from alcoholism or the other diseases named. Otherwise I decline to charge as asked. This leaves the matter entirely with you.

Thereupon the defendant prayed an exception to said charge as made and to the refusal to charge as requested, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The defendant thereupon prayed an exception to that part of the charge of the court which is in these words: "If, on the other hand, the testimony does not so satisfy you, or if you are convinced that all the liquor which he used was used in good faith, under medical advice and for medical purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The defendant also prayed an exception to that part of the charge of the court which is in the following words: "If, on the other hand,

the plaintiff has satisfied you that neither of these clauses of the condition have been violated or broken by Mr. Davy, or if the
515 defendant fails to satisfy that they have been so broken, then your verdict will be in favor of the plaintiff," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The defendant also prayed an exception to that part of the charge of the court which is in the following words: "As a matter of law I charge you that this certificate is not to be taken or accepted by you as conclusive evidence of the truth of the facts therein stated, nor is the plaintiff bound by this statement or estopped from proving to your satisfaction a different cause of death," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GRELN, *J.* [L. S.]

The defendant also prayed an exception to that part of the charge of the court which is in the following words: "The weight of the evidence must decidedly preponderate on the side of the defendant," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The defendant also prayed an exception to that part of the charge of the court which is in the following words: "It is in evidence that Mr. Davy did take alcoholic stimulants under medical advice. If his taking them was only under medical advice and only
516 in such quantities prescribed by a physician, even if the impairment of health followed, yet the policy would not become void," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The defendant also prayed an exception to that portion of the charge of the court which is in the following words: "If from all the testimony in this case you conclude that Mr. Davy's condition in this respect was produced by a strict, fair, and *bona fide* following of Dr. Kellerman's prescription, then that impairment of health, if there was any, which it is alleged existed, known as cirrhosis of the liver, does not avoid this policy," which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

Governor BEDLE: We would like to have the full benefit of this point—that the case was left to the jury to determine on the facts whether the plaintiff was entitled to recover instead of a direction to find for the defendant, and the jury was left at liberty to find for the plaintiff or the defendant; to which action on the part of the court the defendant prayed an exception.

Thereupon an exception was allowed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

517 The defendant also prayed an exception to the charge of the court concerning the use and construction of the word "probably" found in Dr. Rae's certificate of death, which was allowed, and that said exception be sealed, and it is sealed accordingly.

EDW. T. GREEN, *J.* [L. S.]

The jury, after an absence of about eight hours, rendered a verdict for the plaintiff for the full amount of the policy and interest.

518 BILL OF PARTICULARS,

Including Policy, Application and Proof of Loss (from No. 1 to No. 9, Inclusive).

Copy of policy.

Number 121,674. Dollars, 10,000.

Ætna Life Insurance Company, Hartford.

Participating policy. Premium, $233.60.

This policy of insurance witnesseth: That the Ætna Life Insurance Company, in consideration of the representations and declarations made to them in the application for this policy and of the annual premium of two hundred — thirty-three dollars and sixty cents, to be paid to them on or before the sixteenth day of July in each and every year during the continuance of this policy, do hereby insure the life of William A. Davey (hereinafter called the insured), of Jersey City, county of Hudson, State of New Jersey, for the term of his natural life, in the sum of ten thousand dollars, the said sum insured to be paid at the office of this company, in Hartford, Connecticut, to his wife, Ada Davey, or, in the event of her death before his, to his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said insured, during the continuance of this policy, any portion of the whole premium for the current year remaining unpaid, or any other indebtedness to this company on account of this policy, being first deducted therefrom.

This policy is issued and accepted upon the following express conditions and agreements:

First. The answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted by the insured to be true in all respects; and if this policy has been obtained by or through any fraud, misrepresentation, or concealment, or by any false statement, then this policy shall be absolutely null and void.

Second. This policy shall not take effect until the advance premium hereon shall have been actually paid, during the lifetime of

the insured, and if any subsequent premium on this policy be not paid when due, during the lifetime of the said insured, then this policy shall cease and determine (except as hereinafter provided), and this company shall not be liable for the payment of the sum insured herein, nor any part thereof, and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary of the company.

Third. The said insured is, under this policy, freely permitted to reside in any settled portion of the Western Hemisphere lying north of the thirty-second parallel of north latitude, at all seasons
519 of the year, and in the United States lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the Eastern Hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude, east from Greenwich, at all seasons of the year, and in Italy, south of said second parallel, excepting from the first day of July to the first day of November; and he may also pass as a passenger, by usual routes and means of public conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits, or shall be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of explosive substances, or as an employee in any capacity in service on any sea, river, lake, or other body of water, or upon any railroad, or if he shall enter into any military or naval service, whether voluntarily or otherwise (the militia, when not in actual service, alone excepted), without the consent of this company previously given in writing, signed by the president or secretary, in each and every of the foregoing cases; or if he shall commit suicide, or die by his own hand, or in consequence of a duel, or in consequence of the violation of any law wherever he may be, or if he shall become so far intemperate as to impair his health or induce delirium tremens, or if his death shall result from injuries received while under the influence of alcoholic liquor, or if he shall be convicted of felony, then, in each and every of the foregoing cases, this policy shall become and be null and void, except as provided in the eighth section of these conditions.

Fourth. No assignment of this policy shall be valid unless made in writing and attached hereto and a copy thereof furnished said company, and any claim against this company arising under this policy made by any assignee shall be subject to proof of interest.

Fifth. All agreements made by this company are signed by its president or secretary; no other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon the company.

Sixth. Permits for residence or travel outside of the limits prescribed above, or to engage in occupations hereby prohibited, may be granted at the option of the company, and on payment of extra premiums to be determined by it, which permits must be signed by the president or secretary of the company.

Seventh. When all the premiums upon this policy shall have been

paid for three years or more, and any subsequent premium shall have become due and not have been paid, a paid-up non-participating policy will be issued for such an amount as the surrender value of this policy will purchase, at the then age of the insured, applied as a net single premium by the actuaries' rate of mortality and four per cent. interest:

Provided this policy be surrendered and application made
520 for said paid-up policy within twelve months from the time when said subsequent premium shall have become due and not have been paid; otherwise this policy shall become and be null and void, except as provided in the eighth section of these conditions. No allowance will be made for this policy unless the premiums for three entire years shall have been paid as they became due, nor thereafter, except in paid-up insurance; and, in determining the amount of the paid-up policy to be issued, premiums paid for entire years only will be considered.

Eighth. In every case when this policy shall cease, be, or become void (except by fraud, misrepresentation, concealment, or by any false statement), if the premiums for three entire years shall have been paid, the amount which by the seventh section of these conditions would be applied to the purchase of a paid-up policy, shall not be forfeited to the said company, but the same shall be due and payable in ninety days after due notice and proof of death of the said insured.

In witness whereof the said Ætna Life Insurance Company have, by their president and secretary, signed and executed this contract, in the city of Hartford, this sixteenth day of July, 1878, but the same shall not be binding until countersigned by L. Morton, agent at New York.

T. O. ENDERS, *President.*
J. L. ENGLISH, *Secretary.*

Countersigned at New York this 17th day of July, 1878.

L. MORTON, *Agent.*

The plaintiff will claim judgment in this suit for the amount named in the foregoing policy, $10,000.

Interest on the same from November 16th, 1881, until paid.

LINN & BABBITT,
Pl'ff's Att'ys.

521 *Application for Policy.*

Ætna Life Insurance Company of Hartford, Conn.

Be particular to fill out these blanks.

Amount, $10,000; age, 31; premium, $233.60.

I, Wm. A. Davey, of Jersey City, county of Hudson, State of N. J.,* being desirous of effecting an insurance with the Ætna Life Insurance Company, in the sum of 10,000 dollars, upon my life *of*† ——, of ——, county of ——, State of ——, during the full term of life, do hereby declare and warrant that my age next birthday will be 32 years; that I am now in good health, of sound body and mind, and do usually enjoy good health, and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of my health, habits of life, or condition which may render an insurance on my life more than usually hazardous or with which the directors of said company ought to be made acquainted, § and — do hereby declare that I have an interest in the life of the said —— to the full amount of the said sum of —— dollars.

And I do hereby agree and warrant that the answers given to the following questions and the accompanying statemements are true, and this declaration shall be the basis and form part of the contract or policy between me and the said company, and that if the same be in any respect false or fraudulent the said policy shall be void, and all moneys which may have been paid on account thereof shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company until the amount of premium as stated therein shall be received by said company, or an accredited agent thereof, in the lifetime of the said † Davey, and a receipt given therefor signed by the president or secretary of the company.

Dated at New York this 13th day of July, 1878.

(Signed) W. A. DAVEY.

Questions and Answers Above Referred To.

1. What is the name, residence, and occupation of the party whose life is proposed to be insured ?¶

☞ Give Christian names in full and plainly written. William A. Davey, Jersey City, N. J.; card-board manufacturer.

What kind of policy is desired? Ordinary life.

*This declaration and application should be made and signed by the person who applies for insurance. If one person applies for insurance on the life of another, both the applicant and the person whose life is to be insured should sign.

†Insert "my own," if assurance is proposed on the party's own life; if on another's life, insert the person's name.

‡"Whole term of life," "Renewable term of ten yea.," or "Endowment term of ten, fifteen years," &c.

§Erase this sentence if the insurance is proposed on your life.

¶The names should be plainly written and residence given in full. ☞All the blanks and certificates should be properly filled before sending to the office.

522 2. What is the name, residence, and relationship of the person for whose benefit the assurance is proposed? Mrs. Ada Davey; wife.

☞Agent will call applicant's attention to explanation given on the margin.

3. What is the place and date of birth of the party whose life is to be insured? ☞Be very particular to answer correctly. Place, Bloomfield, N. J.; y'r, 1847; mo., Jan.; day, 25.

4. What is the age next birthday? ☞Be particular to answer correctly. 32 years.

5. Is the party whose life is to be insured married? Yes. Are the habits of the party sober and temperate? Yes.

6. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily? No.

7. Has the party been successfully vaccinated? Yes. Has the party had small-pox or varioloid? No.

8. Has the party been acclimated to a southerly climate; if so, when and how? No. Has the party had the yellow fever, and when? No.

9. Has the party been or is he employed in the army or navy? No. Is the party engaged in the manufacture or sale of malt or spirituous liquor? No. What employment has the party been engaged in? Manufacturing. Has any employment in which the party has been engaged had any injurious effect upon his health? No.

10. Has the party ever resided in southern, western, or foreign climates; and, if so, what effect was produced on the constitution and health? No.

11. Are there or have there ever been any signs of any nervous affection or of predisposition thereto? No.

12. Has the party had any of the following diseases? Answer yes or no opposite each. Apoplexy, no; asthma, no; bronchitis, no; consumption, no; disease of the heart, no; dropsy, no; epilepsy, no; fits, no; fistula, no; gout, no; habitual headache, no; insanity, no; liver complaint, no; neuralgia, no; paralysis, no; palpitation, no; rheumatism, no; rupture, no; spitting of blood, no; scrofula, no; syphilis, no; tumors, no; ulcers, no; disease of urinary organs, no.

13. Has the party had inflammatory rheumatism; if so, when and how often? No.

14. Is the party subject to dyspepsia, dysentery, or diarrhœa? No. Has the party now, or has he had, an habitual cough? No.

15. Has the party ever met with any severe personal injury or been subjected to any severe surgical operation, or has he any material defect of eye-sight or hearing? If so, state particulars. No.

16. Has the party had, during the last seven years, any disease or severe sickness? If so, state the particulars of each case and the name of the attending physician. No.

17. Have the ancestors of the party generally reached old age? Yes.

523 18. Has either of the parents, brothers, sisters, or other near relatives of the party been afflicted with rheumatism, insanity, or with pulmonary, scrofulous, or any hereditary disease? No.

19. Are the parents of the party living? Father: ——. Age: ——. State of his health: ——. Mother: Living. Age: About 63. State of her health: Good.

20. Are the parents of the party dead? Father: Dead. Age at death: 51. Cause of death: Disease of the liver. Mother: ——. Age at death: ——. Cause of death: ——.

21. How many brothers has the party had? 4. How many are living? 3. At what ages? About 29, 27, 23. What is the state of their health, respectively? All good. How many have died? One. At what age? In infancy. Of what diseases did they die? ——.

22. How many sisters? 1. How many are living? 1. At what age? About 25. What is the state of their health, respectively? Good.

23. What is the name and residence of the family physician of the party or of one whom the party has usually employed or consulted? Dr. Hyde; Brooklyn.

24. What is the name and residence of an intimate friend? Wm. A. Stiles.

25. Has any proposal or application to insure the life of the party been made to any company or agent for which insurance has not been granted it? If so, state particulars and the names of all such companies or agents. No.

26. What amounts are now insured on the life of the party and in what companies? If insured in this company state the number and amount of each and every policy. No.

27. Has any company in which the party's life has ever been insured or the agent of any such company expressed an opinion that the risk was undesirable or refused to reinstate any such insurance after it had lapsed? If so, state particulars, and the names of all such companies or agents. No.

28. Has any physician expressed an unfavorable opinion upon the life of the party with reference to life insurance? If so, state particulars. No.

29. Is the party and the applicant aware that any untrue or fraudulent answers to the above queries or any suppression of facts in regard to the health, habits, or circumstances of the party to be insured will vitiate the policy and forfeit all payments thereon; has he carefully read the questions and answers thereto; and does he understand that all policies and agreements made by the Ætna Life Insurance Company are signed by its president or secretary, and that no other person can grant insurance or make any agreement binding upon the company? Yes.

‖ In signing write the Christian name in full.

‖(Signed) W. A. DAVEY.

In presence of—
L. MORTON.

524 [On margin:] If a policy for the benefit of the wife alone is applied for it will be written, unless otherwise requested herein, payable to her at the death of the husband whose life is insured, but payable to his estate in event of her death before his.

If a policy for the benefit of the wife and children or other near relatives of the person whose life is insured is applied for the policy will, unless otherwise requested herein, be made payable equally to such of those beneficiaries as may survive the life insured, and in event of the death of all before that of the life insured, it will be payable to the estate of the person whose life is insured.

If an endowment policy is applied for the policy will be made payable, at the end of the term, to the person whose life is insured, unless otherwise requested herein.

Edition of March, 1878.

Mr. William A. Davey, examined at New York city the 13th day of July, 1878.

☞ Examinations must be made by the regularly appointed physician of the Ætna Life Insurance Co.

N. B.—The medical examiner is requested to be very minute in his examination, to answer each question fully, and to write the result of the examination himself. He is also requested to require the signature of the person examined at the foot of this certificate. During the examination neither the agent nor any other third person should be present.

1. Height, 5 7½; figure, med.; weight, 139; number of inches around the chest, 32.36; temperament, bilious; general appearance and habits of life, good; color, wh.

2. Are there or have there ever been any signs of apoplexy, paralysis, epilepsy, insanity, or any other nervous affection, or of predisposition to them? No.

3. Has the person now or has he had scrofula, rheumatism, gout, aneurism, rupture, tumors, dropsy, or any disease of the kidneys or bladder? No.

4. What is the stethoscopic character of respiration. Is it full, easy, gentle, and regular? Is the inspiratory murmur full and healthy, and to be heard over both lungs? Respiration normal.

5. Rate and other qualities of the pulse, 75—soft & regular; number of respirations per minute, 16. Does percussion or auscultation indicate disease in any part of the viscera of the chest? No.

6. Has the person a cough, occasional or habitual, or occasional or uniform difficulty in breathing? No.

7. Is the stethoscopic character of the heart's action uniform, free, and unobstructed? Yes. Is there any irregular action or has there been at any time? No.

8. Does auscultation indicate enlargement, ossification, or disease of the heart of any kind? No.

9. Is there any abdominal disease, externally or internally? Have any of the abdominal viscera been diseased? No.

10. Has the person ever suffered from mechanical injury or disease of any kind? 1863, had pneumonia.

525 11. Are the parents of the person living; and, if not, of what disease did they die and at what age? Father died of cirrhosis of liver.

12. Are there any hereditary diseases in the family; and, if so, what are they? No.

13. Opinion of life and prospect of longevity. Good.

14. Do you consider the person safely insurable, and do you recommend the company to grant a policy? Yes.

15. Has the person above referred to signed his name below in your presence? Yes.

JOEL W. HYDE,
Examining Physician.

Physician: Where graduated, ——. When graduated ——.

Person examined sign here. Write the Christian names in full.
W. A. DAVY.

[Endorsed:] No. 121,674. Approved: M. M. Ætna Life Insurance Company, Hartford, Conn. Date of policy, July 16, 1878. Sum insured, $10,000. Term of, life. Life of William A. Davey. Residence: Town, Jersey City; county, Hudson; State, N. J. Occupation, card-board manuf. Benefit of wife, Ada Davey; or, in event of her death before his, to his exec., &c. Declaration dated 13 day of July, '78. Age, 31. Date of birth: Month, Jan.; day, 25; year, 1847. Premium, $233.60; extra do. $——. Policy, $234.60. Agent, L. Morton. ☞Agents are requested not to fill the above blanks. (Edition of Mar., 1878.) Pol. ed. Jan., '78. 56.

I certify that I have been personally acquainted with ——, of ——, during the last —— years, and do believe that h— habits of living are temperate; that h— is now in good health, and does ordinarily enjoy good health, and that I know of no constitutional infirmity or other circumstance affecting h— calculated to make an insurance on h— life more than usually hazardous, excepting ——.

Dated at —— this — day of ——, 18—.

(Signed) —— ——.

No. 1.

PROOF OF LOSS.

Identity of Party.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

William A. Stiles, of Jersey City, New Jersey, being duly sworn, deposes and says that he was personally acquainted with Mr. William A. Davey, of Jersey City, New Jersey, now deceased, and that the said William A. Davey was the identical person whose life was insured in the Ætna Life Insurance Company, under polic- No.*

* Please be careful and give the right number.

526 121,674, bearing date the 16th day of July, A. D. 1878, and who was therein described as Mr. William A. Davey, of Jersey City, New Jersey.

W. A. STILES.

Subscribed and sworn to before me this 11th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

No. 2.

Proof from Sexton or Undertaker.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

William H. Speer, of Jersey City, New Jersey, being duly sworn, deposes and says that he is an undertaker; that as such undertaker he was called upon the eighth day of August last to prepare the dead body of William A. Davey for burial; that he placed said body in a coffin, and duly closed and fastened the lid, and that he placed said coffin containing the said body in a grave in Greenwood cemetery, and that the said coffin was left by deponent in said grave and duly covered.

WILLIAM H. SPEER,
Undertaker.

Subscribed and sworn to before me this 13th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

No. 3.

Proof from Minister or other Party who Officiated at the Interment of the Deceased.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

Rev'd G. Henry Sterling, of St. John's Free Ch., Jersey City Hgts, being duly sworn, deposes and says that he is the assistant minister of St. John's Free Church, at Jersey City Heights, and that he was personally acquainted with Mr. W. A. Davey, of Jersey City, in his lifetime, now deceased, and that said W. A. Davey was interred in the burial ground of Greenwood cemetery on the 9th day of August, A. D. 1881, and he as such minister officiated at such interment.

G. HENRY STERLING.

Subscribed and sworn to before me this 12th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

527

No. 4.

*Proof of Age of Party.**

STATE OF NEW JERSEY, *County of Hudson,* } ss:

Edmund H. Davey, of Jersey City, New Jersey, the brother of William A. Davey, late of Jersey City, New Jersey, now deceased, being duly sworn, deposes and says that the said William A. Davey was born at Bloomfield, in the State of New Jersey, on the 25th day of January, A. D. 1847, and that the said William A. Davey was consequently, on the 6th day of August, 1881 (the date of his decease), thirty-four (34) years, six (6) months, and 12 days old, as shown by the family record of the deceased.

EDMUND H. DAVEY.

Subscribed and sworn to before me this 11th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

No. 5.

Proof Required from Assignee.

STATE OF ——, *County of* ——, } ss:

—— ——, of ——, being duly sworn, deposes and says that —— ——, the assignee of polic- No. ——, issued by the Ætna Life Insurance Company, of Hartford, Conn., on the life of —— ——, who died at ——, in the State of ——, on the — day of ——, A. D. 18—.

Deponent further say- that the assignment of said polic- —— made to —— by —— —— on the — day of ——, 18—, and was in consideration of† —.

Deponent further say- that no portion of the above indebtedness has been canceled, but that —— now ha- an interest in said polic- by reason of said assignment to the amount of $——, to which amount —— claim —— legally entitled. Deponent further says said polic- has never otherwise been assigned than as above stated.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 18—.

[SEAL.] —— ——,
—— ——.

☞ * This affidavit may be made by a relation of the party.
In all cases the fullest and most satisfactory evidence as to the age of the person insured must be furnished, in order to make the proof of claim complete.

† A full statement in detail of the amount and character of the indebtedness should here be given.

528 No. 6.

Proof Required from the Party Who Claims the Amount Insured.

STATE OF NEW JERSEY, } ss :
County of Hudson, }

Ada Davey, of Jersey City, New Jersey, being duly sworn, deposes and says that she is the same person for whose benefit was effected an insurance on the life of William A. Davey in the Ætna Life Insurance Company of Hartford, Conn., on the 16th day of July, A. D. 1878, under policy No. 121,674.

Deponent further says she had an insurable interest in the life of William A. Davey to the amount of $10,000, and that the same was not created by reason of any gambling or other illegal transaction, nor was the effecting of said insurance a mere gambling or speculating transaction, but said William A. Davey was indebted to her as his true and lawful wife.

Deponent further says that she is 31 years, 5 months, 7 days old.

Deponent further says that said policy has never been assigned or transferred to any person or persons, and that said amount is legally due to her, as the true and lawful wife of the said William A. Davey.

(S'd) ADA DAVEY.

Subscribed and sworn to before me this 12th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

☞ Where the policy was made for the benefit of the wife it is absolutely required that she should fill out or sign this certificate, and state that her husband was indebted to her "as his true and lawful wife." When filled out by the executor or administrator, he, she, or they should state that deceased was indebted to them "as the legally appointed administrator or executor (as the case may be) on the estate of the deceased."

7.

Proof Required as to the Movements of the Party While Insured by the Company.

STATE OF NEW JERSEY, } ss :
County of Hudson, }

Edmund H. Davey, of Jersey City, New Jersey, being duly sworn, deposes and says that he was personally acquainted with William A. Davey, late of Jersey City, New Jersey, deceased; that from the sixteenth day of July, A. D. 1878 (the day the insurance was effected), up to the sixth day of August, A. D. 1881 (the date
529 of his decease), the said William A. Davey was not absent from the State of New Jersey, to the best of deponent's knowledge,

information, or belief, except as follows: In November and December, A. D. 1880, he visited England, Ireland, and Paris (France); he made occasional business trips to Boston, Buffalo, and Philadelphia of from one to three days' duration; on or about July 25, 1881, he visited Alexandria Bay (New York State).

EDMUND H. DAVEY.

Subscribed and sworn to before me this 12th day of August, A. D. 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

☞ If the party has been absent, state when, where, and how often, with every particular the party is possessed of.

Instructions for Filling out Proofs of Loss.

Before the claim can be paid the following requirements must be complied with:

1. When the policy is made payable to the estate of the deceased, if a will has been made by the deceased, we should have a certified copy of the letters testamentary issued to the executor. If no will was made an administrator should be appointed, and we should be furnished with a certified copy of the letters of administration. The executor or the administrator should make affidavit No. 6.

2. When the policy is made for the benefit of the wife and children (or the children only) we must be furnished with an affidavit, properly certified, giving the names and dates of birth of all the children interested, and if any are minors a guardian should be appointed for such, and we should be furnished with a certified copy of the letters of guardianship. The affidavit should be made so as to show that the children named are all and the only children interested, form for which will be furnished if applied for at the office of the company.

3. When the policy is made for the benefit of the husband, wife, children, or any other person, they should fill out certificate No. 6. Should the children be minors the guardian will fill it out in their behalf. Should the party (or any of them) for whose benefit the policy is made be dead we should be furnished with an affidavit stating when and where he or she died, as also the cause of death.

4. If the policy has been assigned the assignee should fill out No. 5 affidavit, showing an itemized account of, as well as the character and amount of, indebtedness; also send a copy of the assignment properly certified.

5. The notaries, justices, or other person before whom the affidavits are made will in all cases send a certificate signed and sealed by the clerk of the district court, or other official, showing when they were commissioned and when their appointment expires.

530 6. Claims are not due and payable until 90 days after due notice and proof of death has been received at the office of the company. Much correspondence and delay will be avoided in

settling claims if parties interested will strictly comply with the above requirements.

[Endorsed:] ☞Agents will call particular attention to instructions on page 4. ☞This blank to be filled at home office. Proof of loss to Ætna Life Insurance Co. on life of William A. Davey. ——, $——. ——, $—— Policy No. 121,674, $10,000. ——, $——. Amount $10,000.00. Received Aug. 17, 1881. Approved ——, 18—. Paid ——, 18—. Am't good for $——. Amount, $——Notes, $——. Surplus, $——. $—— $——. Deferred due, $——. $——. Interest, $—— $——. Cash paid, $——. Agent, L. Morton. When due, Nov. 17, 18-1.

STATE OF NEW JERSEY, } ss:
Hudson County, }

I, Henry K. Van Horn, clerk of the county of Hudson, and also clerk of the circuit court and court of common pleas, holden therein, do hereby certify that Abraham Van Horn, before whom the foregoing affidavit was taken, was at the date thereof, a notary public in and for said county and State, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe the signature purporting to be his is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said courts and county this 13th day of August, A. D. 1881.

[SEAL.] H. K. VAN HORN, *Clerk.*

No. 9.

Physician's Certificate of Death for the Ætna Life Insurance Company.

☞The physician should himself fill out this certificate and be particular to state when he was called to attend as well as the date of death.

STATE OF NEW JERSEY, *County of Hudson:*

Walter Rae, of Jersey City, N. J., being duly sworn, deposes and says that he is a "regular" physician by profession; that as such physician he attended Mr. William A. Davey, of Jersey City, N. J., in his last illness; that he was called upon to attend on or about the 4th day of August, 1881, and continued with him as such until the time of his death, viz., on the 6th day of August, A. D. 1881, and that the following answers to the proposed questions give all the facts relating to his last illness:

1. How long have you known the deceased? A. About 3 years.
2. What was the direct cause of death? B. Exhaustion from hamatemis-is.

531 2. What were the indirect causes of death? Exposure to the sun and cirrhosis of the liver.

3. Was his last illness occasioned or had his general health been impaired by any pernicious habits? He was in the habit of using

stimulants and a great deal of tobacco—probably they impaired his health.

4. A. Was his death occasioned by his own hands? A. No. B. By duelling? B. No. C. Or by the hands of justice? C. No.

5. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused, directly or indirectly, from intemperance? B. See answer to 3.

6. Was there a post-mortem examination? If so, state the particulars. No.

9. Was any physician associated with you or had any other physician been employed in the management of the case? If so, state who. Dr. Watson; Alexandria Bay, N. Y.

8. Was there anything remarkable developed by the history, progress, or treatment of the case? If so, state the particulars in full. A. No.

WALTER RAE, *M. D.*

Subscribed and sworn to before me this thirteenth day of August, 1881.

[SEAL.] ABRAHAM VAN HORN,
Notary Public, State of New Jersey.

N. B.—A certificate should be sent from the proper authority showing that the person before whom this affidavit is made is, on the day it is executed, duly authorized to administer oaths.

[On margin:] NOTICE. ☞The medical attendant will please be as explicit as possible in stating the cause of death—*e. g.*, if heart disease, state whether valvular, hypertrophy, fatty degeneration, &c., and so with other diseases.

STATE OF NEW JERSEY, } ss:
Hudson County, }

I, Henry K. Van Horn, clerk of the county of Hudson, and also clerk of the circuit court and court of common pleas, holden therein, do hereby certify that Abraham Van Horn, before whom the foregoing affidavit was taken, was at the date thereof a notary public in and for said county & State, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe the signature purporting to be his is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said courts and county this 13th day of August, A. D. 1881.

[L. S.] H. K. VAN HORN, *Clerk.*

531½ UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of

Ada Davey against The Ætna Life Insurance Company as the same appears on file and of record in my office.

The Seal of the U. S. Circuit Court, District of New Jersey.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Trenton, in said district, this — day of October, A. D. 1890.

S. D. OLIPHANT, *Clerk.*

532 Supreme Court of the United States, at October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff in Error,
against
ADA DAVY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Ætna Life Insurance Company, by Theron G. Strong, its attorney, and says that in the record of proceedings aforesaid there is manifest error, in this, to wit:

I. That the court erred in allowing the witness Ada D. Ward (p. 10) to answer the following question, put to her by the counsel for the defendant in error:

"Q. What did he (the president of the Ætna Life Insurance Company) say in reference to having received notice and proofs of death and their intention to pay or not to pay?"

II. That the court erred in allowing the witness L. C. Watson (p. 25) to answer the following question, put to him by the counsel for the defendant in error:

533 "Q. Do physicians prescribe alcohol to be taken sometimes in quite considerable quantities?"

III. That the court erred in refusing to overrule, at the request of the counsel for the plaintiff in error, the answer of the witness Walter Rae (p. 387) in the following words:

"I did not see him (Davy) exposed to the sun; I was told that he had been exposed to the sun."

IV. That the court erred in allowing the witness Walter Rae (p. 388) to answer the following question, put to him by the counsel for the defendant in error:

"Q. Why did you give that certificate stating the indirect cause of death was exposure to the sun and cirrhosis of the liver?"

V. That the court erred in allowing the witness Walter Rae (p. 399) to answer the following question, put to him by the counsel for the defendant in error:

"Q. From whom did you receive information upon which you based that certificate?"

VI. That the court erred in refusing to allow the witness A. C.

Mattoon (p. 457) to answer the following question, put to him by the counsel for the plaintiff in error:

"Q. Did you testify this way on that examination, 'I have no real estate that I know of'?"

534 VII. That the court erred in allowing the witness Ada D. Ward (p. 472) to answer the following question, put to her by the counsel for the defendant in error:

"Q. Did he (Davy) take them under medical advice?"

IX. The court erred in allowing the witness Ada D. Ward (p. 472) to answer the following question, put to her by the counsel for the defendant in error:

"Q. Did he (Davy) or not take them for medical purposes?"

X. That the court erred in allowing the witness Ada D. Ward (p. 484) to answer the following question, put to her by the counsel for the defendant in error:

"Q. Now, Mrs. Ward, you may answer that question, whether when you visited Dr. Kellerman with your husband he prescribed for him."

XI. That the court erred in allowing the witness Ada D. Ward (p. 485) to answer the following question, put to her by the counsel for the defendant in error:

"Q. Did Dr. Rae ever prescribe for your husband in your presence and in his presence?"

XII. That the court erred in allowing the witness Ada D. Ward (p. 485) to answer the following question, put to her by the counsel for the defendant in error:

"Q. Among other things, what did he prescribe?"

535 XIII. That the court erred in allowing an answer (p. 503) to the question to the witness James H. Hunt, which question was in the following words:

"Q. I want to ask the Doctor this, whether he can say what was the cause of death in that case"—

to go upon the record, and especially in accepting as the answer of the witness, without his actually answering the same, the following statement of counsel for the defendant in error:

"Mr. LINN: That may be. The symptoms which this man exhibited were such that a physician without an autopsy could not tell from what he died."

XIV. That the court erred in allowing the witness William A. Katzenbach (pp. 518–520) to answer the question beginning with the following words, put to him by the counsel for the defendant in error:

"Q. I will ask you the same question which I put to Dr. Hunt yesterday, and in order that you may have it clearly before your mind I will allow you to read the question."

XV. That the court erred (p. 536) in refusing at the close of the evidence to direct a verdict for the defendant, as requested by the counsel for the plaintiff in error.

536 XVI. That the court erred (p. 557) in charging the jury, in reply to the second request to charge of the defendant in error, in the following words:

"I decline to charge that further than that you ought to gather from all the testimony in the case what was the cause of death."

The court erred in making use of the words "you ought to gather from all the testimony in the case what was the cause of death."

XVII. That the court erred (p. 557) in charging the jury, in answer to the third request to charge of the defendant in error, in the following words:

"I charge that with this addition the question is wholly for the jury upon the evidence in the case under the instructions as to the legal questions given by the court."

The court erred especially in making use of the words "this is a question wholly for the jury upon the evidence in the case."

XVIII. That the court erred (p. 558) in charging the jury, in reply to the fourth request to charge of the defendant in error, in the following words:

"The burden of proof is upon the defendant-; they must satisfy you that the defense has been made out."

XIX. That the court erred (p. 558) in charging the jury, in answer to the fifth request to charge of the defendant in error, in the following words:

537 "I suppose that is practically the same. It is that the jury must be satisfied of the truth of the defense. That is practically included in the other charge that the burden is upon the defendants; they must satisfy the jury of the truth of their defense."

XX. That the court erred (p. 559) in charging the jury, in answer to the eighth request to charge of the defendant in error, in the following words:

"The first part of that I charge that these opinions (of physicians) are founded upon testimony giving what is called a history of the case, and you must determine whether that history is true. You must determine whether the facts upon which the hypothetical questions are based have been proved or not to your satisfaction. I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis."

The court especially erred in making use of the words "I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis."

XXI. That the court erred (p. 560) in charging the jury, as prayed for in the ninth request to charge of the counsel for the defendant in error, as follows:

538 "If the jury should believe that the efficient, controlling cause of the death of William A. Davy was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medicinal purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens."

XXII. That the court erred (p. 560) in charging the jury, as

prayed for in the tenth request to charge of the counsel for the defendant in error, as follows:

"Whether the health of William A. Davy was impaired by the use of alcoholic stimulants, not taken in good faith for medicinal purposes or under medical advice, is a matter to be determined by the jury under all the evidence."

XXIII. That the court erred (p. 561) in refusing to charge the jury otherwise than already charged, as prayed for in the second request to charge of the plaintiff in error, to wit:

"The expression of the policy 'become so far intemperate as to impair his health or induce delirium tremens' does not mean habitual intemperance or the injurious addiction to alcoholic liquors."

XXIV. That the court erred (p. 561) in refusing to charge
539 the jury, as prayed for in the eighth request to charge of the plaintiff in error, without modification, to wit:

"If the jury believe that said Davy, after the delivery of the policy, had delirium tremens induced by the intemperate use of alcoholic liquors, the policy is void, except as therein provided."

And also erred in adding thereto the following words: "Provided that said use was not under medical advice and for medical purposes only, and with that condition I charge that to be the law."

XXV. That the court erred (p. 562) in refusing to charge the jury, as prayed for in the ninth request to charge of the plaintiff in error, without modification, to wit:

"If the jury believe that the intemperate use of alcoholic liquors by said Davy at Alexandria Bay in 1881 resulted in impairing his health in any degree, the policy is void, excep tas therein provided."

And also erred in adding thereto the following words: "If the use of the liquor was not under medical advice and for medical purposes only."

XXVI. That the court erred (p. 563) in refusing to charge the jury, as prayed for in the tenth request to charge of the plaintiff in error, to wit:

"If the jury find that the illness of William A. Davy at Alexandria Bay in the summer of 1881, which resulted in his death,
540 was occasioned by the intemperate use of alcoholic liquors, the policy is null and void, except as therein provided."

And also erred in adding thereto the following words: "It seems to me that the objection to all these requests is that they should have included the words 'not under medical advice or for medical purposes.' If the intemperate use of liquor caused his death, if it was not taken under medical advice or for medical purposes, of course the condition was broken."

XXVII. That the court erred (pp. 564–565) in refusing to charge the jury, as prayed for in the eleventh request to charge of the plaintiff in error, to wit:

"If the jury find that the illness of William A. Davy at Alexandria Bay in the summer of 1881, which resulted in his death, was not occasioned wholly by the intemperate use of alcoholic liquors, but that the intemperate use of the same contributed to said illness

and to that extent impaired his health, the policy is null and void, except as herein provided."

XXVIII. That the court erred (p. 565) in refusing to charge the jury, as prayed for in the twelfth request to charge of the plaintiff in error, without modification, to wit:

"If the jury find that the said William A. Davy drank alcoholic liquor at Alexandria Bay to the extent testified to by the witnesses for the defense, and that such drinking of the same was in-
541 temperate and the effect thereof was to impair his health to any degree or induce delirium tremens, the policy is void, except as therein provided."

And also erred in striking out therefrom the words "in any degree."

XXIX. That the court erred (p. 565) in refusing to charge except as already charged on that subject, as prayed for in the thirteenth request to charge of the plaintiff in error, to wit:

"If the jury believe that the said Davy was not habitually intemperate or injuriously addicted to the use of alcoholic liquor, yet if the intemperate use of alcoholic liquors by said Davy at Alexandria Bay in the summer of 1881, notwithstanding such use may have been exceptional, impaired his health or induced delirium tremens, the said policy is null and void, except as therein provided."

XXX. That the court erred (p. 566) in refusing to charge except as already charged on that subject, as prayed for in the fourteenth request to charge of the plaintiff in error, to wit:

"In considering the question whether Davy after the issuing of the policy became so far intemperate as to impair his health or induce delirium tremens the jury must render a verdict for the defendant, even though they should find that Davy was not in the habit of using or injuriously addicted to the intemperate use of alcoholic liquors, if they are satisfied that said Davy impaired
542 his health or induced delirium tremens by any, even a single occasion of, intemperate use of alcoholic liquor."

XXXI. That the court erred (p. 566) in refusing to charge except as already charged on that subject, as prayed for in the fifteenth request to charge of the plaintiff in error, to wit:

"The jury need not consider the question whether the alleged intemperance amounted to a habit or injurious addiction on the part of Davy, but only the question whether by the intemperate use of liquor, even though it was by a single act or rare and exceptional use, his health was impaired and delirium tremens induced."

XXXII. That the court erred (p. 567) in refusing to charge the jury, as prayed for in the sixteenth request to charge of the plaintiff in error, to wit:

"The paper entitled 'Physician's certificate,' made by Dr. Rae and furnished by the plaintiff to the defendant, is *primâ facie* evidence that the said William A. Davy was in the habit of using stimulants, and probably they impaired his health."

XXXIII. That the court erred (p. 567) in charging the jury, in reply to the sixteenth request to charge of the plaintiff in error, as follows:

"It is not *prima facie* evidence. It must be taken into consideration with the other evidence, and I have told you what weight to give it."

543 The court especially erred in making use of the words "it is not *prima facie* evidence."

XXXIV. That the court erred (p. 568) in refusing to charge the jury, as prayed for in the seventeenth request to charge of the plaintiff in error, to wit:

"That said paper, having been introduced as evidence on behalf of the plaintiff, taken in connection with Dr. Rae's testimony, establishes that the said William A. Davy was in the habit of using stimulants, and that they probably impaired his health."

XXXV. That the court erred (p. 568) in charging the jury, in reply to the seventeenth request to charge of the plaintiff in error, as follows:

"It is a question solely for the jury, and they must determine what the paper and the evidence amount to. It is not for the court to lay down what the evidence means; it is your province alone."

XXXVI. The court erred (p. 569) in refusing to charge the jury, as prayed for in the eighteenth request to charge of the plaintiff in error, to wit:

"The burden of explaining or correcting said certificate rests on the plaintiff."

XXXVII. That the court erred (p. 569) in refusing to charge the jury, as prayed for in the nineteenth request to charge of the plaintiff in error, to wit:

544 "In order to overcome the statements in said certificate by a correction or explanation of the same the plaintiff must establish to the satisfaction of the jury, by a preponderance of evidence, that Dr. Rae was mistaken in his statements therein, and in determining said question the evidence of Dr. Rae that he adheres to the statements contained in it and the evidence offered by defendant tending to confirm the statements of Dr. Rae therein must be taken into consideration, and unless the plaintiff overcomes said certificate of Dr. Rae as well as the defendant's testimony supporting it, by a preponderance of evidence, the plaintiff has failed to correct or explain said certificate."

XXXVIII. That the court erred (p. 570) in charging the jury, in reply to the nineteenth request to charge of the plaintiff in error, as follows:

"I decline to charge that, except as I have charged you originally upon the weight of evidence, to wit, the weight of evidence in this case is upon the defendant."

XXXIX. That the court erred (p. 570) in refusing to charge the jury, as prayed for in the twentieth request to charge of the plaintiff in error, to wit:

"As a matter of law, upon the undisputed facts in the case, there can be no recovery for the full amount of the policy."

545 XL. That the court erred (p. 570) in charging the jury, in

reply to the twentieth request to charge of the plaintiff in error, as follows:

"If I were to charge that, what use would there be for the jury? The court is not here to determine the facts, but simply to lay down the law. The facts are for you to weigh and determine."

XLI. That the court erred (p. 571) in refusing to charge the jury, as prayed for in the twenty-first request to charge of the plaintiff in error, to wit:

"If the jury believes the evidence of White, Duclone, Dr. Watson, and Dr. Bruce as to what occurred at Alexandria Bay in the summer of 1881, there can be no recovery for the full amount of the policy."

XLII. That the court erred (p. 571) in refusing to charge the jury, as prayed for in the twenty-second request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of White, Duclone, Dr. Watson, and Dr. Bruce."

XLIII. That the court erred (p. 572) in charging the jury, in reply to the twenty-first and twenty-second requests to charge of the plaintiff in error, as follows:

"The same objection applies to these requests numbers twenty-one and twenty-two as to number twenty. It is calling upon the court to weigh this evidence. I decline to charge that simply
546 because it is your duty to weigh the evidence. If after weighing the evidence you are satisfied with it, undoubtedly your verdict will be for the defendant; but if you are not satisfied with it your verdict will be for the plaintiff. I cannot charge what the jury ought to do with the testimony."

XLIV. That the court erred (p. 572) in refusing to charge the jury, as prayed for in the twenty-third request to charge of the plaintiff in error, to wit:

"If the jury believe the evidence of Dr. Watson, Dr. Bruce, and the evidence of Dr. Rae in connection with his certificate, there can be no recovery for the full amount of the policy."

XLV. That the court erred (p. 573) in refusing to charge the jury, as prayed for in the twenty-fourth request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of Dr. Watson, Dr. Bruce, and the certificate of Dr. Rae, or either."

XLVI. That the court erred (p. 573) in refusing to charge the jury, as prayed for in the twenty-fifth request to charge of the plaintiff in error, to wit:

"If the jury believe the evidence of Dr. Watson, Dr. Bruce, and White, there can be no recovery for the full amount of the policy."

XLVII. That the court erred (p. 574) in refusing to charge
547 the jury, as prayed for in the twenty-sixth request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of White, Dr. Watson, Dr. Bruce, or either."

XLVIII. That the court erred (p. 574) in charging the jury, in

reply to the twenty-sixth request to charge of the plaintiff in error as follows:

"The whole matter is in the hands of the jury."

XLIX. That the court erred (p. 574) in refusing to charge the jury, as prayed for in the twenty-seventh request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in finding that the quantity of liquor which Davy, on the undisputed testimony, drank at Alexandria Bay in the summer of 1881 was taken in good faith for medicinal purposes."

And also erred in making use of the words "so far as I remember" and the words "of some witnesses" in the following charge in reply to said request:

"There was nothing in the case, so far as I remember, to justify the jury in finding that the quantity of liquor which Davy, according to the evidence of some witnesses, drank at Alexandria Bay in the summer of 1881 was taken in good faith for medicinal purposes."

L. That the court erred (p. 575) in refusing to charge the
548 jury, as prayed for in the twenty-eighth request to charge of the plaintiff in error, to wit:

"The certificate of Dr. Rae must be overcome by the plaintiff to justify a recovery as claimed."

LI. That the court erred (p. 576) in refusing to charge, except as already charged, as prayed for in the twenty-ninth request to charge of the plaintiff in error, to wit:

"To establish a breach of the condition of the policy, 'become so far intemperate as to impair his health,' it is not necessary to satisfy the jury that his health was impaired to the extent of causing death."

LII. That the court erred (p. 576) in refusing to charge the jury, as prayed for in the thirtieth request to charge of the plaintiff in error, to wit:

"The proof of the physician (Dr. Watson) who attended the deceased in his last illness and of others immediately around him is so positive and so free from contradiction that it is difficult to conceive how the breach of the condition in the policy could be proved if it is not proven in this case."

LIII. That the court erred (p. 577) in refusing to charge the jury, as prayed for in the thirty-first request to charge of the plaintiff in error, to wit:

"In view of such of the evidence as cannot be judicially disregarded, but which must be accepted as true, it is the duty of the court to say that a verdict for the plaintiff for the full amount
549 of the policy cannot be maintained."

LIV. That the court erred (p. 578) in refusing to charge the jury, except as already charged, as prayed for in the thirty-second request to charge of the plaintiff in error, to wit:

"The evidence on the subject of the general habits of the deceased from witnesses testifying that they had never seen him intoxicated, being of a negative character, cannot outweigh the positive evidence

as to the intemperate use by Davy of alcoholic liquor at Alexandria Bay in the summer of 1881."

LV. That the court erred (p. 579) in refusing to charge the jury, as prayed for in the thirty-third request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in finding that Davy in the summer of 1881 had a sun-stroke."

LVI. That the court erred (p. 580) in charging the jury, in reply to the thirty-third request, as follows:

"You are the judges of the evidence, as I have stated before, to say whether he (Davy) was suffering from exposure to the sun or sun-stroke or whether he was suffering, as the other witnesses testify, from alcoholism or the other diseases named. Otherwise I decline to charge as asked. This leaves the matter entirely with you."

550 LVII. That the court erred (pp. 553 & 580) in charging the jury as follows:

"If, on the other hand, the testimony does not so satisfy you, or if you are convinced that all the liquor which he used was used in good faith under medical advice and for medical purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff."

LVIII. That the court erred (pp. 539 & 581) in charging the jury as follows:

"If, on the other hand, the plaintiff has satisfied you that neither of these clauses of the condition has been violated or broken by Mr. Davy, or if the defendant fails to satisfy you that they have been so broken, then your verdict will be in favor of the plaintiff."

LIX. That the court erred (pp. 547 & 581) in charging the jury as follows:

"As a matter of law I charge you that this certificate is not to be taken or accepted by you as conclusive evidence of the truth of the facts therein stated, nor is the plaintiff bound by this statement or estopped from proving to your satisfaction a different cause of death."

LX. That the court erred (pp. 553 & 582) in charging the jury as follows:

"The weight of evidence must decidedly preponderate on the side of the defendant."

The court especially erred in making use of the word "decidedly" in connection with the word "preponderate."

551 LXI. That the court erred (pp. 554 & 582) in charging the jury as follows:

"It is in evidence that Mr. Davy did take alcoholic stimulants under medical advice. If his taking them was only under medical advice and only in such quantities as prescribed by a physician, even if the impairment of health followed, yet the policy would not become void."

LXII. That the court erred (pp. 555 & 582) in charging the jury as follows:

"If from all the testimony in this case you conclude that Mr.

Davy's condition in this respect was produced by a strict, fair, and *bona fide* following of Dr. Kellerman's prescription, then that impairment of health, if there was any, which it is alleged existed, known as cirrhosis of the liver, does not avoid this policy."

LXIII. That the court erred (pp. 548 & 584) in charging the jury concerning the use and construction of the word "probably," found in Dr. Rae's certificate of death, as follows:

"Now, some criticism has been made on the word 'probably' in that certificate. I will read it again: 'He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health.' You must, of course, put a construction on that word 'probably,' and that construction must be such as would
552 suggest itself from the usual and common meaning of the word. The word 'probably' suggests a 'judging of facts' in the 'light of experience.' You see a dark, heavy mass of clouds arising rapidly in the skies on an oppressively warm day; from out of the black and seething mass flashes continuously the vivid, blinding lightning, and you say there will probably be a thunder-storm; judging from what you see, aided by past experience of approaching storms, you think it more likely that there will be a thunder-storm than there will not be a thunder-storm. The evidence of a coming storm, in your opinion, is weightier and more certain than the evidence of coming of pleasant weather, and you use the word 'probably' to express your conviction. I think it will be safe for you to assume that Dr. Rae used the word in this sense. That is for you to judge, however, but if you adopt what I think is the plain meaning of that word what he said in his certificate, then, would be this, to paraphrase it, that in his opinion Mr. Davy's use of stimulants more likely impaired his health than that they did not impair his health. The evidences of impairment of health as judged by his experience were weightier than the evidence of non-impairment."

LXIV. That the court erred (p. 583) in leaving the case to the jury to determine on the facts whether the defendant in error was entitled to recover instead of giving a direction to find for the defendant.

553 LXV. That there was manifest error in that, upon the uncontradicted evidence in the case, the jury should have found a verdict for the plaintiff in error, and should have been so directed by the court, as requested by counsel for the plaintiff in error.

LXVI. That there was manifest error in that the verdict of the jury in favor of the defendant in error was against the uncontradicted evidence in the case, and the court should have directed a verdict otherwise, as requested by counsel for the plaintiff in error.

And the said Ætna Life Insurance Company, the plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

THERON G. STRONG,
Attorney for Plaintiff in Error,
45 *William Street, New York, N. Y.*

554 [Endorsed:] U. S. Supreme Court. The Ætna Life Ins. Co. of Hartford, Conn., plaintiff in error, against Ada Davy, defendant in error. Assignment of errors. Theron G. Strong, attorney for plaintiff, 45 William St., New York city.

Endorsed on cover: New Jersey C. C. U. S. No. 1388. The Ætna Life Insurance Company of Hartford, Connecticut, plaintiff in error, *vs.* Ada Ward, wife of Charles Ward (formerly Ada Davey). Filed October 13, 1890.

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Supreme Court of the United States.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

Plaintiff in Error,

versus

ADA WARD (FORMERLY ADA DAVEY).

BRIEF OF WAYNE MAC VEAGH AND THERON G. STRONG,

Of Counsel for Plaintiff in Error.

Evening Post Job Printing House, New York.

Supreme Court of the United States.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff in Error, AGAINST ADA WARD (formerly ADA DAVEY).	No. 1388. October Term, 1890.

In Error to the Circuit Court of the United States, for the District of New Jersey.

Brief of Wayne MacVeagh and Theron G. Strong, Counsel for Plaintiff in Error.

The plaintiff below was the wife of William A. Davey. She brought this action to recover the amount of a policy of insurance upon his life. Her declaration alleged that on July 16, 1878, the defendant made and executed a policy of insurance, dated on that day, whereby, in consideration of the representations and declarations made to it in the application for the said policy, and of an annual premium, the defendant did insure the life of William A. Davey for the term of his natural life in the sum of $10,000, the said sum to be paid at the office of said company in Hartford, Conn., to his wife, Ada Davey, within ninety days after *due notice and proof of the death of the said William A. Davey during the continuance of said policy.* It also alleged that the policy was issued and accepted

upon certain conditions and agreements therein contained, the only one material being as follows:

"THIRD.—The said insured is under this policy freely permitted to reside in any settled portion of the western hemisphere lying north of the thirty-second parallel of north latitude at all seasons of the year and in the United States lying south of said thirty-second parallel, excepting from the 1st day of July to the 1st day of November; and in the eastern hemisphere lying north of the forty-second parallel of north latitude, and west of the fortieth meridian of longitude east from Greenwich at all seasons of the year, and in Italy south of said forty-second parallel, excepting from the 1st day of July to the 1st day of November; and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall at any time during the continuance of this policy pass beyond or be without the foregoing limits, or shall be personally engaged in blasting, mining or sub-marine operations, or in the manufacture or transportation of explosive substances, or as an employee in any capacity in service on any sea, river, lake, or other body of water, or upon any railroad, or if he shall enter into any military or naval service, whether voluntarily or otherwise (the militia when not in actual service alone excepted), without the consent of this company previously given in writing, signed by the President or Secretary, in each and every of the foregoing cases; or if he shall commit suicide, or die by his own hand, or in consequence of a duel, or in consequence of the violation of any law wherever he may be, *or if he shall become so far intemperate as to impair his health or induce delirium tremens*, or if his death shall result from injuries received while under the influence of alcoholic liquor, or if he shall be convicted of felony, then in each and every of the foregoing cases this policy shall become and be null and void, except as provided in the eighth section of these conditions."

The declaration then alleged a compliance with all the conditions of the policy, and in particular that he did not become so far intemperate as to impair his health or induce delirium tremens, contrary to the agreements and conditions contained in said policy.

It further alleged that the said Davey died during the

continuance of said policy on the 6th day of August, 1881, and that due notice and proof of death was given to the defendant below on the 16th day of August, 1881.

The plea alleged two defenses:

1st. Untrue statements in the application.

2d. Breach of a condition subsequent, to wit: That if the said William A. Davey should become so far intemperate as to impair his health or induce delirium tremens, the said policy should become and be null and void. That the said Davey, after the issuing of the said policy, did become so far intemperate as greatly to impair his health and to induce delirium tremens, by reason whereof the said policy became null and void.

The plaintiff below, after proving the death of said insured on August 6, 1881, offered in evidence certain papers, including physician's certificate of death, as constituting proofs of loss, claimed to have been served on the defendant below on the 16th of August, 1881, in compliance with and during the continuance of said policy, and said papers will be found on pages 320-6 of the Record.

By the physician's certificate (p. 325), which was a part of said proofs, the following questions and answers were made:

"3. Was his last illness occasioned or had his general health been impaired by any pernicious habits? He was in the habit of using stimulants and a great deal of tobacco —probably they impaired his health.

5. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused directly or indirectly from intemperance? B. See answer to 3."

The plaintiff below then rested.

The defendant then called witnesses who established the following facts:

From about the year 1870 to 1881, inclusive, Davey had been in the habit of going each summer on a fishing excursion to Alexandria Bay, when for two or three weeks he would be upon the St. Lawrence River nearly every day in a small row boat in company with a boatman, dur-

ing which time it was his habit to drink as much as a quart bottle of brandy daily, and also drink several times in the evening at the bar or in his room,

Andrew Duclone (pp. 67–81).
Gifford Benson (pp. 41–3).
William Comstock (pp. 44–9).
Theodore Lear (pp. 52–6).
Louis Dereyaw (pp. 56–67).
Oliver Sykes (pp. 81–2).
Cyrus Dale (pp. 82–7).
William White (pp. 96–109).
John R. Gibson (pp. 171–9).
Albert Root (pp. 179–86).
Joseph Senecal (pp. 189–203).

On July 24, 1881, he arrived at the Crossman House, Alexandria Bay, on his annual excursion (fol. 399).

From the day of his arrival to August 2d (when he was found sick), he spent nearly every day from 8 or 9 A. M. to 4 to 6 P. M. on the river in company with his boatman, William White, and invariably took with him a quart bottle (and sometimes more) of brandy, and on an average would consume a quart daily while on the river.

William White (fols. 122½–130).

In addition to this he frequently went across the river to Rockport and drank there; also, at least every other day to Theodore Lear's Island View House and drank brandy at the bar as often as once an hour while there, buying and taking away with him also one or two bottles of brandy and gin. He would take six or seven drinks there, and frequently appeared to be intoxicated.

William White (fols. 126–9).
Theodore Lear (fols. 85–7).
William Comstock (fol. 81).
Andrew Duclone (fol. 105).
Cyrus Dale (fols. 114–20).
William Hunt (fol. 167).
John R. Gibson (fols. 260–8).
Joseph Senecal (fols. 289–94).
Albert Root (fols. 272–5).

In addition to this, during the evening of each day for the same period, he drank at the Crossman House bar at intervals of say three-quarters of an hour—three to six times during the evening.

William Comstock (fols. 78–9).
Louis Dereyau (fols. 89–90).
Andrew Duclone (fol. 100).
Oliver Sykes (fol. 109).
William Hunt (fols. 224–5).
James R. Gibson (fol. 260).

In addition to this, on every or nearly every evening during the same period, he had one or more drinks sent to his room in the Crossman House.

Cyrus Dale (fols. 111–14).

In addition to this, during the last few days of the same period, he had one or more drinks sent to his room every morning before breakfast.

Cyrus Dale (fol. 111).

In addition to this, he frequently, during the same period, drank at the Crossman House bar in the morning before breakfast.

Oliver Sykes (fol. 109).
William Comstock (fol. 81).
William Hunt (fols. 224–5).
James R. Gibson (fol. 261).

In addition to this, on the afternoon of Tuesday, August 2, 1881, he ordered, and the bell-boy, Cyrus Dale, took to his room two quart bottles of liquor—one of brandy or whisky and the other of gin. He was alone, and it does not appear that there was any one with him in his room that day, after this liquor was taken to him.

Cyrus Dale (fols. 112–13).

The bell-boy, Dale, on going to Davey's room on the morning of Wednesday, August 3d, found him sitting in bed with his clothing and the bed clothing spattered with blood, and considerable blood in the slop-jar, which was

standing beside the bed. The brandy and gin bottles sent up the afternoon before were empty, their contents having evidently been consumed by Davey. Subsequently he stated to Dr. Watson (his physician) that he had been drinking heavily during the night. He called for liquor which the bell-boy got, and the bell-boy also subsequently got him another drink of liquor.

Cyrus Dale (fols. 112–13).
Andrew Duclone (fols. 101–6).
William White (fols. 142–5).
Dr. Watson (fols. 28–30).

At the bell-boy's request, Mr. Crossman, the proprietor of the house, and Frank Bruce, then a medical student and clerk at the house, but now a practicing physician, went to Davey's room. On seeing his condition they sent for Dr. L. C. Watson to attend him.

Davey complained that he saw pitch or fire and smoke, and tried to point it out about the room; also began kicking the bedclothes and complained that somebody was trying to saw his legs and arms off; also that a heavy pipe or tube was lying across his chest, which he, with the assistance of Dr. Bruce, went through the movement of lifting off the bed. At other times he complained of having on a pair of stockings that reached above his knees, and of having a pair of boots on which he asked Dr. Bruce to pull off.

Dr. Bruce (fols. 61–4).
Cyrus Dale (fols. 113–14).
William Comstock (fol. 80).
William Hunt (fols. 225–7).
Dr. Watson (fols. 42–3).

Davey called continually for liquor and seemed to be very nervous and tremulous.

William Comstock (fols. 80–1).
Andrew Duclone (fol. 102).
Cyrus Dale (fol. 113).
William White (fols. 142–5).
Dr. Bruce (fols. 62–63).
Dr. Watson (fols. 29–30).

At intervals his attendants were obliged to restrain him by force, so that when Dr. Rae (his family physician from Jersey City) and the plaintiff (his wife) arrived at Alexandria Bay, about noon of August 4th, he was very weak and exhausted, in which state he remained until his death, August 6th.

William Comstock (fol. 80).
Andrew Duclone (fol. 102).
Dr. Bruce (fols. 62–64).

In a rational moment he said to Dr. Watson: "I suppose it is all up with me," and admitted that his physician had told him he would have hemorrhage of the stomach unless he stopped drinking so much.

Dr. Watson (fol. 29).

Dr. Watson and Dr. Bruce testify that when they visited him in the morning of August 3d, the ailment from which he was suffering was *delirium tremens;* that they knew the symptoms of this disease and that there can be no mistake.

Dr. Watson (fols. 31–33).
Dr. Bruce (fols. 65–66).

Dr. Ward (now and for twenty years Superintendent of the New Jersey State Insane Asylum, near Trenton), and Dr. W. L. L. Phillips (a leading physician in Trenton), testified that on the basis of the symptoms testified to by Drs. Watson and Bruce, as exhibited by said Davey, he was beyond question suffering from *delirium tremens.* That it could have been nothing else.

Dr. Ward (fols. 318–320).
Dr. Phillips (fols. 324–326).

The medical witnesses were unanimous that the use of a much less quantity of alcoholic liquor than was, according to undisputed evidence, consumed by the said Davey at Alexandria Bay, and *even the consumption of the two quarts of liquor left by the bell-boy in Davey's room on the*

afternoon of August 2d, would, in the case of even a *temperate* man, inevitably impair his health, and probably cause death either with or without delirium tremens.

Dr. Ward (fols. 318–319).
Dr. Phillips (fols. 322–326).

The testimony of the witness Dale as to the taking of the two quarts of liquor to Davey's room, and of that witness and Dr. Watson, Dr. Bruce and Mr. Crossman of finding him ill next morning, and the liquor bottles empty, and that of the witnesses Duclone and Dale as to the conduct of said Davey at that time, and that of the witnesses White and Dale who describe the extent to which the said Davey drank during the previous ten days, and the evidence of Drs. Watson and Bruce that he then had delirium tremens, is absolutely without contradiction, direct or indirect.

Defendant then rested.

Plaintiff in rebuttal then called various relatives and family friends, whose testimony tended to prove that, *so far as they knew*, Davey's general course of life had been sober and temperate, although all who knew him admitted he was a drinking man, &c., but not one of them (except A. C. Mattoon) saw Davey at Alexandria Bay in the summer of 1881; and there was no testimony whatever contradicting defendant's witnesses as to the use of alcholic liquors by said Davey and their effect upon him from the time he arrived at Alexandria Bay, July 23, 1881, until after he was found sick in his room, as above stated.

Mattoon, although at Alexandria Bay in 1881, stopped at a different hotel from Davey, and testifies that he saw Davey only five or six times between the date of his arrival, July 23d, and Sunday, July 31st; that Davey did not appear to him to be intoxicated; that he did not see him after July 31st until after he was found sick in his room (fols. 397–98, 401–3). He admits, however, that Davey was in the habit of

drinking more or less (fol. 398). And, as will hereafter be seen, Mattoon's testimony is not only purely negative, and therefore of little weight, but the offspring of prejudice and bias, and of a manifest desire to aid and assist plaintiff in every way, and its effect is further lessened by the contradictions and lapses of memory of the witness.

Dr. Rae, plaintiff's only medical witness who had ever seen Davey, did not arrive at Alexandria Bay until about noon of August 5th, after the exhaustion and quiescence which usually follows delirium had supervened, and he left Saturday, August 6th (fols. 353, 349); he does not pretend to say that Davey was not suffering from delirium tremens when seen by Drs. Watson and Bruce two days and a half before; on the contrary, he testifies that his knowledge of the case was derived mainly from information imparted to him by Dr. Watson and the attendants (fols. 354–60). He still adhered to the statements in his certificate of death, testifying as follows (fols. 354–6):

"Q. You certified that he was in the habit of using stimulants? A. Yes, sir.

Q. And that was true? A. Yes, sir.

Q. And by stimulants you wish me to understand alcoholic liquor? A. Yes, sir.

Q. And when you say probably they impaired his health that was your opinion at that time? A. Yes, sir.

Q. You don't deny that it was your judgment that they impaired his health? A. They mean tobacco and liquor together.

Q. I ask you about stimulants, nothing about tobacco. You don't deny that, in your judgment, that they impaired his health? A. I said they probably did.

Q. I don't ask you what you said in your certificate, and if you will pay attention to the question we will get along faster. You don't deny that it is your judgment that they impaired his health, do you? A. No, sir.

Q. You adhere to the statements that are contained in the certificate? A. Yes, sir, as far as I know."

Dr. Rae also testifies that *Davey admitted to him that he was in the habit of taking three or four drinks a day,*

and that drinking even that amount regularly would tend to impair a man's health (fols. 357-59).

Plaintiff thereupon rested.

The defendant, there being no conflict of evidence on the vital points as to the amount of liquor consumed by Davey for ten days before his illness, the inevitable impairment of health by such use, and the fact that Davey, when found by Dr. Watson, was suffering from delirium tremens, asked the Court to direct a verdict for the defendant, which was refused (fol. 480).

The jury rendered a verdict for plaintiff for the full amount of the policy (fol. 517), and thereupon his Honor, the presiding Judge, granted to the defendant this writ of error.

Specification of Errors Relied Upon.

FIRST.—That the Court erred in allowing the witness Ada D. Ward (p. 472) to answer the following question put to her by the counsel for the defendant in error:

"Q. Did he (Davey) take them under medical advice?"

SECOND.—The Court erred in allowing the witness Ada D. Ward (p. 472) to answer the following question put to her by the counsel for the defendant in error:

"Q. Did he (Davey) or not take them for medical purposes?"

THIRD.—That the Court erred in allowing the witness Ada D. Ward (p. 484) to answer the following question put to her by the counsel for the defendant in error:

"Q. Now, Mrs. Ward, you may answer that question, whether when you visited Dr. Kellerman with your husband he prescribed for him?"

FOURTH.—That the Court erred (p. 536) in refusing at the close of the evidence to direct a verdict for the defendant as requested by the counsel for the plaintiff in error.

FIFTH.—That the Court erred (p. 557) in charging the jury in reply to the second request to charge of the defendant in error in the following words:

"I decline to charge that further than that you ought to gather from all the testimony in the case what was the cause of death."

The Court erred in making use of the words "you ought to gather from all the testimony in the case what was the cause of death."

SIXTH.—That the Court erred (p. 558) in charging the jury in reply to the fourth request to charge of the defendant in error in the following words:

"The burden of proof is upon the defendants; they must satisfy you that the defense has been made out."

SEVENTH.—That the Court erred (p. 558) in charging the jury in answer to the fifth request to charge of the defendant in error in the following words:

"I suppose that is practically the same. It is that the jury must be satisfied of the truth of the defense. That is practically included in the other charge that the burden is upon the defendants; they must satisfy the jury of the truth of the defense."

EIGHTH.—That the Court erred (p. 559) in charging the jury in answer to the eighth request to charge of the defendant in error in the following words:

"The first part of that I charge—that these opinions (of physicians) are founded upon testimony giving what is called a history of the case, and you must determine whether that history is true. You must determine whether the facts upon which the hypothetical questions are based have been proved or not to your satisfaction. I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis."

The Court especially erred in making use of the words: "I also charge you that you have the right if you do not

confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis."

NINTH.—That the Court erred (p. 560) in charging the jury as prayed for in the ninth request to charge of the counsel for the defendant in error as follows:

"If the jury should believe that the efficient, controlling cause of the death of William A. Davey was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medicinal purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens."

TENTH.—That the Court erred (p. 560) in charging the jury as prayed for in the tenth request to charge of the counsel for the defendant in error as follows:

"Whether the health of William A. Davey was impaired by the use of alcoholic stimulants not taken in good faith, for medicinal purposes or under medical advice, is a matter to be determined by the jury under all the evidence."

ELEVENTH.—That the Court erred (p. 561) in refusing to charge the jury as prayed for in the eighth request to charge of the plaintiff in error without modification, to wit:

"If the jury believe that said Davey after the delivery of the policy had delirium tremens, induced by the intemperate use of alcoholic liquors, the policy is void, except as therein provided."

And also erred in adding thereto the following words: "Provided that said use was not under medical advice and for medical purposes only, and with that condition I charge that to be the law."

TWELFTH.—That the Court erred (p. 562) in refusing to charge the jury as prayed for in the ninth request to charge of the plaintiff in error, without modification, to wit:

"If the jury believe that the intemperate use of alcoholic liquors by said Davey at Alexandria Bay in 1881 resulted in impairing his health in any degree, the policy is void except as therein provided."

And also erred in adding thereto the following words: "If the use of the liquor was not under medical advice and for medical purposes only."

THIRTEENTH.—That the Court erred (p. 563) in refusing to charge the jury as prayed for in the tenth request to charge of the plaintiff in error, to wit:

"If the jury find that the illness of William A. Davey, at Alexandria Bay in the summer of 1881, which resulted in his death was occasioned by the intemperate use of alcoholic liquors, the policy is null and void, except as therein provided."

And also erred in adding thereto the following words: "It seems to me that the objection to all these requests is that they should have included the words 'not under medical advice or for medical purposes.' If the intemperate use of liquor caused his death, if it was not taken under medical advice or for medical purposes, of course the condition was broken."

FOURTEENTH.—That the Court erred (p. 567) in refusing to charge the jury as prayed for in the sixteenth request to charge of the plaintiff in error, to wit:

"The paper entitled 'Physician's Certificate,' made by Dr. Rae and furnished by the plaintiff to the defendant, is *prima facie* evidence that the said William A. Davey was in the habit of using stimulants, and probably they impaired his health."

FIFTEENTH.—That the Court erred (p. 567) in charging the jury in reply to the sixteenth request to charge of the plaintiff in error as follows:

"It is not *prima facie* evidence; it must be taken into consideration with the other evidence, and I have told you what weight to give it."

The Court especially erred in making use of the words "It is not *prima facie* evidence."

SIXTEENTH.—That the Court erred (p. 568) in refusing to charge the jury as prayed for in the seventeenth request to charge of the plaintiff in error, to wit:

"That said paper having been introduced as evidence on behalf of the plaintiff, taken in connection with Dr. Rae's testimony, establishes that the said William A. Davey was in the habit of using stimulants, and that they probably impaired his health."

SEVENTEENTH.—That the Court erred (p. 568) in charging the jury in reply to the seventeenth request to charge of the plaintiff in error as follows:

"It is a question solely for the jury, and they must determine what the paper and the evidence amount to. It is not for the Court to lay down what the evidence means; it is your province alone."

EIGHTEENTH,—The Court erred (p. 569) in refusing to charge the jury as prayed for in the eighteenth request to charge of the plaintiff in error, to wit:

"The burden of explaining or correcting said certificate rests on the plaintiff."

NINETEENTH.—That the Court erred (p. 569) in refusing to charge the jury as prayed for in the nineteenth request to charge of the plaintiff in error, to wit:

"In order to overcome the statements in said certificate by a correction or explanation of the same, the plaintiff

must establish to the satisfaction of the jury by a preponderance of evidence that Dr. Rae was mistaken in his statements therein, and in determining said question the evidence of Dr. Rae that he adheres to the statements contained in it, and the evidence offered by defendant tending to confirm the statements of Dr. Rae therein, must be taken into consideration, and unless the plaintiff overcomes said certificate of Dr. Rae as well as the defendant's testimony supporting it, by a preponderance of evidence, the plaintiff has failed to correct or explain said certificate."

TWENTIETH.--That the Court erred (p. 570) in charging the jury in reply to the nineteenth request to charge of the plaintiff in error as follows:

"I decline to charge that except as I have charged you originally upon the weight of evidence, to wit, the weight of evidence in this case is upon the defendant."

TWENTY-FIRST.—That the Court erred (p. 570) in refusing to charge the jury as prayed for in the twentieth request to charge of the plaintiff in error, to wit:

"As a matter of law, upon the undisputed facts in the case, there can be no recovery for the full amount of the policy."

TWENTY-SECOND.—That the Court erred (p. 570) in charging the jury in reply to the twentieth request to charge of the plaintiff in error as follows:

"If I were to charge that, what use would there be for the jury? The Court is not here to determine the facts, but simply to lay down the law. The facts are for you to weigh and determine."

TWENTY-THIRD.—That the Court erred (p. 571) in refusing to charge the jury as prayed for in the twenty-first request to charge of the plaintiff in error, to wit:

"If the jury believe the evidence of White, Duclone

Dr. Watson and Dr. Bruce, as to what occurred at Alexandria Bay in the summer of 1881, there can be no recovery for the full amount of the policy."

TWENTY-FOURTH.—That the Court erred (p. 571) in refusing to charge the jury as prayed for in the twenty-second request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of White, Duclone, Dr. Watson and Dr. Bruce."

TWENTY-FIFTH.—That the Court erred (p. 572) in charging the jury in reply to the twenty-first and twenty-second requests to charge of the plaintiff in error, as follows:

"The same objection applies to these requests numbers twenty-one and twenty-two as to number twenty. It is calling upon the Court to weigh this evidence. I decline to charge that simply because it is your duty to weigh the evidence. If after weighing the evidence you are satisfied with it, undoubtedly your verdict will be for the defendant; but if you are not satisfied with it your verdict will be for the plaintiff. I cannot charge what the jury ought to do with the testimony."

TWENTY-SIXTH.—That the Court erred (p. 572) in refusing to charge the jury as prayed for in the twenty-third request to charge of the plaintiff in error, to wit:

"If the jury believe the evidence of Dr. Watson, Dr. Bruce, and the evidence of Dr. Rae in connection with his certificate, there can be no recovery for the full amount of the policy."

TWENTY-SEVENTH.—That the Court erred (p. 573) in refusing to charge the jury as prayed for in the twenty-forth request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of Dr. Watson, Dr. Bruce, and the certificate of Dr. Rae, or either."

TWENTY-EIGHTH.—That the Court erred (p. 573) in refusing to charge the jury as prayed for in the twenty-fifth request to charge of the plaintiff in error, to wit:

"If the jury believe the evidence of Dr. Watson, Dr. Bruce and White there can be no recovery for the full amount of the policy."

TWENTY-NINTH.—That the Court erred (p. 574) in refusing to charge the jury as prayed for in the twenty-sixth request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in disregarding the evidence of White, Dr. Watson, Dr. Bruce, or either."

THIRTIETH.—That the Court erred (p. 574) in charging the jury in reply to the twenty-sixth request to charge of the plaintiff in error as follows:

"The whole matter is in the hands of the jury."

THIRTY-FIRST.—That the Court erred (p. 574) in refusing to charge the jury as prayed for in the twenty-seventh request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in finding that the quantity of liquor which Davey, on the undisputed testimony, drank at Alexandria Bay in the summer of 1881, was taken in good faith for medicinal purposes."

And also erred in making use of the words "so far as I remember," and the words "of some witnesses," in the following charge in reply to said request:

"There was nothing in the case, so far as I remember, to justify the jury in finding that the quantity of liquor which Davey, according to the evidence of some witnesses, drank at Alexandria Bay in the summer of 1881, was taken in good faith for medicinal purposes."

THIRTY-SECOND.—That the Court erred (p. 575) in refusing to charge the jury as prayed for in the twenty-eighth request to charge of the plaintiff in error, to wit:

"The certificate of Dr. Rae must be overcome by the plaintiff to justify a recovery as claimed."

THIRTY-THIRD.—That the Court erred (p. 576) in refusing to charge, except as already charged, as prayed for in the twenty-ninth request to charge of the plaintiff in error, to wit:

"To establish a breach of the condition of the policy, 'become so far intemperate as to impair his health,' it is not necessary to satisfy the jury that his health was impaired to the extent of causing death."

THIRTY-FOURTH.—That the Court erred (p. 576) in refusing to charge the jury as prayed for in the thirtieth request to charge of the plaintiff in error, to wit:

"The proof of the physician (Dr. Watson) who attended the deceased in his last illness, and of others immediately around him, is so positive and so free from contradiction that it is difficult to conceive how the breach of the condition in the policy could be proved if it is not proven in this case."

THIRTY-FIFTH.—That the Court erred (p. 577) in refusing to charge the jury as prayed for in the thirty-first request to charge of the plaintiff in error, to wit:

"In view of such of the evidence as cannot be judicially disregarded, but which must be accepted as true, it is the duty of the Court to say that a verdict for the plaintiff for the full amount of the policy cannot be maintained."

THIRTY-SIXTH.—That the Court erred (p. 578) in refusing to charge the jury, except as already charged, as

prayed for in the thirty-second request to charge of the plaintiff in error, to wit:

"The evidence on the subject of the general habits of the deceased from witnesses testifying that they had never seen him intoxicated, being of a negative character, cannot outweigh the positive evidence as to the intemperate use by Davey of alcoholic liquor at Alexandria Bay in the summer of 1881."

THIRTY-SEVENTH.—That the Court erred (p. 579) in refusing to charge the jury as prayed for in the thirty-third request to charge of the plaintiff in error, to wit:

"There is nothing in the case to justify the jury in finding that Davey in the summer of 1881 had a sunstroke."

THIRTY-EIGHTH.—That the Court erred (p. 580) in charging the jury to reply to the thirty-third request as follows:

"You are the judges of the evidence, as I have stated before, to say whether he (Davey) was suffering from exposure to the sun or sunstroke, or whether he was suffering, as the other witnesses testify, from alcoholism or the other diseases named. Otherwise I decline to charge as asked. This leaves the matter entirely with you."

THIRTY-NINTH.—That the Court erred (pp. 553 and 580) in charging the jury as follows:

"If, on the other hand, the testimony does not so satisfy you, or if you are convinced that all the liquor which he used was used in good faith under medical advice and for medical purposes as claimed by the plaintiff, then your verdict should be for the plaintiff."

FORTIETH.—That the Court erred (pp. 553 and 582) in charging the jury as follows:

"The weight of evidence must decidedly preponderate on the side of the defendant."

The Court especially erred in making use of the word "decidedly" in connection with the word "preponderate."

FORTY-FIRST.—That the Court erred (pp. 554 and 582) in charging the jury as follows:

"It is in evidence that Mr. Davey did take alcoholic stimulants under medical advice. If his taking them was only under medical advice and only in such quantities as prescribed by a physician, even if the impairment of health followed, yet the policy would not become void."

FORTY-SECOND.—That the Court erred (pp. 555 and 582) in charging the jury as follows:

"If from all the testimony in this case you conclude that Mr. Davey's condition in this respect was produced by a strict, fair and *bona fide* following of Dr. Kellerman's prescription, then that impairment of health, if there was any, which it is alleged existed known as cirrhosis of the the liver, does not avoid this policy."

FORTY-THIRD.—That the Court erred (p. 583) in leaving the case to the jury to determine on the facts whether the defendant in error was entitled to recover, instead of giving a direction to find for the defendant.

FORTY-FOURTH.—That there was manifest error in that upon the uncontradicted evidence in the case the jury should have found a verdict for the plaintiff in error, and should have been so directed by the Court as requested by counsel for the plaintiff in error.

FORTY-FIFTH.—That there was manifest error in that the verdict of the jury in favor of the defendant in error was against the uncontradicted evidence in the case, and the Court should have directed a verdict otherwise as requested by counsel for the plaintiff in error.

BRIEF OF THE ARGUMENT.

First.—*The policy was issued upon the express condition that it shoutd cease and determine if the insured "should become so far intemperate as to impair his health or induce delirium tremens." The question to be decided is whether a breach of this condition has been established.*

I.—The meaning and signification of the words "become so far intemperate as to impair his health or induce delirium tremens" are not open to conjecture. This Court, on a writ of error in this very case, disposed of that question. Mr. Justice Harlan, 123 U. S., 739, says:

"If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance within the meaning of the words 'so far intemperate as to impair his health,' although he may not have had delirium tremens, and although previously to his last illness he had not indulged in strong drinks for such a long period of time, or so frequently as to become habitually intemperate."

II.—Judge Green laid down the rule *in haec verba* and added:

"If impairment of health or if delirium tremens is caused by or followed his intemperance, then the degree of intemperance, which has been forbidden by this condition, has been reached. Thus you will perceive that a single debauch, lasting for a period of a few days, or it may be a single day only, resulting in the impairment of health or in delirium tremens, will be clearly that intemperance which is positively forbidden. In other words, it is the effect and not the duration of the intemperance which the condition has special regard to, and such is the practical construction given to this very clause by the Supreme Court of the United States in this very case, when it was before them for review, after a verdict had been obtained by the plaintiff in this Court."

III.—That a single debauch may produce delirium tremens is unquestionable.

In Insurance Company *vs.* Foley (105 U. S., 350), the Court, by Mr. Justice Field, said:

"An attack of delirium tremens may sometimes follow a single excessive indulgence Rae, in his treatise on Medical Jurisprudence, says that though it most commonly occurs in habitual drunkards, after a few days of abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those not habitually intemperate as well as those who are" (Sec. 545).

IV.—The inquiry then is narrowed to this: Did the liquor Davey drank for ten days before his illness, and especially the two bottles which, upon absolutely uncontradicted evidence, he drank the night before he was found ill by Dr. Bruce, when he was immediately pronounced by Doctors Bruce and Watson to be suffering from delirium tremens, induce either the illness or the delirium tremens? If it did the facts controlled by the law of the case as announced establish a breach of the condition of the policy.

Second.—*Uncontradicted and unimpeached evidence established beyond all question that Davey's illness, which terminated in his death, was the result of the intemperate use of alcoholic liquor, and the Court therefore erred in refusing to instruct the jury that the condition of the policy relating to intemperance was broken, and in refusing to direct a verdict for the defendant below.*

I.—The time and place of such intemperance was at Alexandria Bay, from about July 22d to his death on August 6, 1881.

II.—It is important to inquire whether any, and if any, which of the witnesses for plaintiff below were in a position in the nature of things to contradict the evidence introduced by defendant below to establish such intemper-

ance. The defendant below insists that the testimony of the witnesses of plaintiff below is purely negative, to the effect that "so far as they know," or "so far as they saw," the insured was not intemperate, and that none of them were in a position to have seen him if he drank as charged, or to know the facts.

III.—Brief reference will be made to the witnesses for plaintiff below, in the order in which they were called.

The following were not at Alexandria Bay: Lewis A. Heck (p. 215), William H. Spear (p. 217), Abraham Van Horn (p. 232), James Clark (p. 234), Henry L. Davis (p. 243), Dr. Hunt and Dr. Katzenbach, called as experts.

The following were not at Alexandria Bay until after Wednesday morning, when he was taken seriously ill: Mrs. Davey and Frank Davey arrived at 10 A. M. Thursday (pp. 12-265); Dr. Rae arrived Friday and departed Saturday (p. 225); Kate H. Davis arrived Saturday just before he died (p. 245).

The following witnesses were at Alexandria Bay, but were so situated as to be unable to contradict the witnesses for plaintiff below on any material point:

Edwin Fry, head waiter, was in the dining-room from 6 A. M., with brief intervals, until 11 P. M.; saw Davey only at meal times. and a few minutes in Davey's room, on the day he died (pp. 236-7).

A. C. Mattoon was at Alexandria Bay during the entire period of Davey's stay. Davey stopped at the Crossman House, and Mattoon at the Thousand Island House. Davey arrived at Alexandria Bay about 7.15 P. M., Saturday; was met by Mattoon on his arrival; saw Davey the following day, Sunday; did not see him Monday, but saw him every other day that week, and the following Sunday. There is no evidence he saw him the second Monday and Tuesday, and while he now testifies he saw Davey after he was taken sick, yet this statement should be compared with his former testimony when the facts were fresh in mind, as follows (p. 294):

Q. You didn't see him, Mr. Davey, after he was taken sick? A. I did not.

Q. Did you ever see him after that Sunday? A. I did not, alive.

He testifies that he did not see him every evening (p. 260); nor more than once or twice in the day time during the week (p. 260); was with him twice at least one hour, and the other times from 30 to 45 minutes (p. 260); was not in the boat with him at any time, and did not accompany him on the river (p. 258). Davey, during the day time, from the time of his arrival until Tuesday of the week he died, invariably went out in the morning with his boatman on the river, and remained away until late in the afternoon. It must therefore be apparent from this fact, and of the fact testified to by Mattoon, that he was not with him more than once or twice for one hour, and the remaining occasions only from 30 to 45 minutes, that he was not under Mattoon's observation except for a very small fraction of the time he was at Alexandria Bay, and that what took place during the day in the boat, and when he was out on the river, was not susceptible of contradiction by Mattoon. All of the other witnesses, except Mattoon, may be dismissed from consideration, and it remains to be seen whether his testimony that he did not see him drink when he was with him, and that he did not appear to be intoxicated when he saw him, is any contradiction or raises any issue as to what Davey drank and what Davey's condition was when Mattoon was not present, or whether he had delirium tremens.

IV.—Before considering the testimony introduced by defendant below as to Davey's intemperance, it will be useful to inquire what the witnesses for plaintiff below have to say upon this subject.

Dr. Rae testifies as follows:

Q. You certified that he was *in the habit* of using stimulants? A. Yes, sir.

Q. And that was true? A. Yes, sir.

Q. And by stimulants you wish us to understand alcoholic liquor? A. Yes, sir.

Q. And when you say probably they impaired his health that was your opinion at that time? A. Yes, sir.

Q. You don't deny that is your judgment that they impaired his health? A. They mean tobacco and liquor together. * * *

Q. You don't deny that it is your judgment that they impaired his health, do you? A. No, sir.

Q. You adhere to the statements that are contained in the certificate? A. Yes, sir, as far as I know. * * *

Q. You adhere to the statements that are contained in that certificate? A. Yes, sir.

Q. Do you know from conversing with Mr. Davey as a physician in Jersey City, that he was in the habit of drinking? A. What do you mean by drinking?

Q. I mean, just taking that question—drinking liquor. A. *I suppose I knew that he took liquor; I suppose that he did.*

Q. *Probably through conversing with him?* A. *Probably so.* * * *

Q. Do you know from his statement to you how many glasses of liquor he was in the habit of taking a day? A. No, I do not. I don't remember of his telling me as to the number of drinks he took a day.

Q. Didn't you testify in this way on the first trial:

"Q. Didn't he say to you he was in the habit of taking "so many glassses of liquor in a day (this was asked by "counsel for defendant), and didn't you mention the "number to me this morning? A. He consulted me in "1880 for indigestion.

"Q. Please answer that question? A. At one time he "took three or four drinks a day.

"Q. He told you that as a physician? A. I think so.

"Q. When was that? A. I thinks that was 1881.

"Q. The year of his death? A. It might have been the "year before, I cannot be positive." Did you so testify on one of the trials? A. I probably did.

Q. And that was true? A. Yes, sir; if I said so, it was true to the best of my recollection.

Mr. Van Horn (Mrs. Ward's witness) also testifies that on his excursions to Alexandria Bay in Davey's company they were in the habit of using alcoholic liquors (p. 230).

Mr. Clark (Mrs. Ward's witness) also testifies:

Q. Was he in the habit of drinking at the bar? A. Yes.

Q. Was he in the habit of drinking in the boat? A. Yes, sir.

Q. Was he in the habit of taking a bottle of liquor with him? A. Yes, sir; we always have.
Q. You know that he was a drinker? A. Yes, sir.
Q. Do you know what he generally drank? A. What do you mean, in the way of stimulants?
Q. Yes. A. Brandy and whisky.

Frank W. Davey (Mrs. Ward's witness), a brother of the insured, testifies as follows:

Q. You know that he did drink alcoholic liquors? A. I do.
Q. Did you ever see him when you thought that he was under the influence of liquor? A. I saw him when I supposed he had been drinking. * * *
Q. Did you notice sometimes he had been drinking in the morning when you saw him? A. Occasionally.
Q. Could you smell it in the morning on him? A. Sometimes.
Q. For now long a period have you known this to continue previous to his death? A. I could not say.

V.—Turning now to defendant's testimony, it establishes, without contradiction or impeachment, that Davey's course of life at Alexandria Bay, from the time he awoke in the morning, until he went to bed at night, was the inordinate and excessive use of alcoholic liquor; that he had delirium tremens, and that it caused his death. It is noteworthy, too, that many of the witnesses by whom this fact is established, viz., Sykes, Duclone, Dereyaw and Dale, were hostile to defendant below and endeavored by every means to avoid stating the facts.

VI.—Before he came from his room in the morning, especially during the latter part of his stay, plain drinks, like whisky, brandy, &c., or mixed drinks, such as cocktails, were ordered and taken to his room.

Dale's testimony, p. 84, &c.

VII.—After he came from his room, but before break-

fast, he drank liquor at the bar—brandy or gin—one or two drinks.

Sykes' testimony, pp. 81–2.
White's testimony, p. 98.
Hunt's testimony, p. 153.
Gibson's testimony, fol. 261.
Comstock's testimony, p. 48.

VIII.—After breakfast, but before starting out fishing, he would sometimes drink at the bar.

White's testimony, p. 98.

IX.—In the boat going across the river he drank before noon, four or five drinks, generally brandy, from a tumbler about one-third full; also in the afternoon on his way home; and generally had two or three bottles with him, and while in the boat he consumed about a quart bottle of liquor daily.

White's testimony, pp. 98–101.

White told him that such drinking would kill him, and he replied it was none of White's business.

White's testimony, p. 101.

X.—From noon to about 2 or 3 o'clock he generally spent at Rockport, at Senecal's, or Benson's, and drank while there as often as six times, and ordinarily about once an hour.

White's testimony, pp. 98, 100.
Lear's testimony, p. 53, &c.
Benson's testimony, p. 42.
Gibson's testimony, fols. 259–60.
Senecal's testimony, pp. 189–92.

He had a flask filed before starting out in the morning, and at these stopping places purchased and took away

with him, on almost every occasion, one or two bottles of liquor.

White's testimony, p. 98.
Lear's testimony, pp. 54–5.
Benson's testimony, p. 42.
Senecal's testimony, fols. 292–3.

At Lear's he appeared to be under the influence of liquor.

Lear's testimony, p. 54.

XI.—Among the uncontradicted instances of gross intoxication, Albert Root, page 180, details the following:

"It was a few days before he died, William White was with him, he rowed into the dock from the river, just close up to the Crossman barn, and as he rowed him in I stood on the dock and I stepped down and asked Mr. Davey if I should assist him out of the boat. He spoke as if he wanted I should help him out; his speech when he said that was thick. I could just understand that he wanted me to help him. I took hold of his right arm and Mr. White took hold of him and we helped him on to the dock. We steadied him on to the dock and I assisted him up to the Crossman House with Mr. White, along up the plank walk. I had hold of his arm and White was on the other side. We sat him on a chair on the veranda and he stayed there. I took him to be intoxicated," At page 181 he said: "I saw him in 1881 more than once; he appeared to me when I saw him as if he was a man that used liquor more than a man should—used too much liquor; in my judgment he was using more than a man could use and stand it a great while."

Joseph Senecal, who kept a farm and boarding house on Grenadier Island on the Canada side, details the following (page 190):

"The last time he came there he was in the worst condition I ever saw him; when I came to the house he was sitting down on the stoop; he was quite stupid from liquor; I knew he had been drinking. I spoke to him about going to bed; he was pretty drunk at this time; he went

to bed about 8 o'clock, and stayed in bed until between 11 and 12; he wanted I should put White in a room close by, in case he wanted him at night he could call him; about 12 o'clock he called him and told him he wanted to go to Alexandria Bay,; White was in bed. I tried to coax him to stay all night and get up early in the morning and go to the Bay; he was pretty weak and looked as though he had had a pretty hard time of it, getting over his spell; he didn't appear to be much better than he was when he went to bed; he said he must and should go, so White and I took him down to the river and put him in the boat; I knew he had been drinking; of course I can tell whether a man has been drinking or not; he went off then; it was a pretty dark night and the wind blew some."

XII.—After his return from the river and up to the time he retired for the night, he drank at the bar sometimes as often as six times and ordinarily once an hour.

White's testimony, p. 100.
Sykes' testimony, p. 81.
Comstock's testimony, p. 46.
Hunt's testimony, p. 153.
Root's testimony, pp. 180–1.
Senecal's testimony, pp. 189–91.
Gibson's testimony, fols. 259–60.

XIII.—After he retired, one or two drinks of brandy or gin were also taken to his room.

Dale's testimony, p. 85.

XIV.—He was almost constantly intoxicated. His general condition during the entire time is well described by Andrew Duclone, friendly to Davey and the plaintiff, and hostile to the defendant, in reply to a question by counsel for plaintiff: Q. "I think you stated that he appeared to be drunk every time you saw him. Did you so state—do you mean to so state?" A. "Well, he was intoxicated most every time I saw him, I thought" (p. 77).

So also says Andrew Comstock, p. 48; Cyrus Dale, p. 88; William White, p. 98; William H. Hunt, p. 156; Albert Root, p. 181; Joseph Senecal, p. 192.

XV.—Coming to the afternoon before he was taken ill, the evidence establishes that he ordered, and the waiter took to his room, two bottles of liquor—gin or whisky, and brandy—which he consumed during the night. The following morning the bottles were found empty and he very ill, and he then stated to Dr. Watson that he had been drinking heavily during the night. It is to be particularly noted that the facts just stated are absolutely uncontradicted, and, in the opinion of the physicians, such a quantity of liquor would probably produce death.

Dale's testimony, p. 85.
Dr. Watson's testimony, pp. 18–19.
Dr. Bruce's testimony, pp. 33–4, 38.
Dr. Phillips' testimony, p. 209.
A. Duclone's testimony, p. 73.
White's testimony, p. 108.

XVI.—From this debauch he never recovered. He stated to Dr. Watson who was immediately sent for that he had been drinking heavily during the night, and had been cautioned by his physician against having these little times and said, "I suppose it is all up with me now." He had violent spasms, imagined he saw pitch, fire and smoke, that heavy weights were on the bed, that he had stockings on, listened for imaginary sounds, required to be restrained by force, continually called for liquor, and while in this condition succeeded in obtaining and drinking nearly a quart of liquor, and in two or three days he died.

Dr. Bruce's testimony as to pitch, smoke and spasms, pp. 34–5.
Dale's testimony as to pitch and smoke, p. 87.
Duclone's testimony as to spasms, using force and calling for liquor, p. 73.
White's testimony as to calling for and drinking liquor, pp. 108–9.
Hunt's testimony as to spasms, p. 154.
Dr. Watson's testimony as to his spasms and his nervous and excited condition, pp. 15, 16.

XVII.—It is to be noted further that this quantity of liquor was taken by a man, not robust and healthy, but (according to plaintiff's own testimony) weak and not in condition to withstand such a debauch.

It is safe to say no physician would have prescribed the amount of liquor which he drank, and the Court charged the jury that there is nothing in the case to justify the jury in finding that the quantity of liquor, if taken, was taken in good faith for medicinal purposes (p. 304).

XVIII.—As to the cause of his illness and of his death, the physician who attended him (Dr. Watson) and Dr. Bruce, now a practicing physician, then a medical student, assert that it was due to the excessive use of liquor. In this they are confirmed by the opinions of Drs. Ward and Phillips, the latter of whom said that consuming two bottles of liqour the night before he was taken ill was enough of itself to poison him absolutely, *i. e.*, kill him; and Dr. Rae in his certificate furnished to the company in reply to the question, " Was his death caused directly or indirectly by intemperance?" states that it was one of the things which impaired his health.

Dr. Watson's testimony, pp. 17–19.
Dr. Bruce's testimony, p. 36.
Dr. Phillips' testimony, p. 209.
Dr. Ward's testimony, pp. 205–6.
Dr. Rae's testimony, p. 226.

XIX.—His own medical physician, Dr. Rae, was obliged to testify in corroboration of Dr. Watson, that the certificate of death furnished to the company as a part of the proofs of the death was made after seeking to inform himself and as giving his judgment as an honest professional man; that the hœmatemissis certified to may be produced by the action of liquor on the stomach; that the cirrhosis of liver certified to is produced in a great majority of cases by spirit drinking; that he adheres to the statement of the certificate that he was in the habit of using stimulants, meaning alcoholic liquor; and that the effect

of them was to impair his health; that his information in regard to Davey's condition was from Davey, who stated that he took three or four drinks a day; that the tendency of this practice would be to impair his health; and that in his judgment it did so impair it.

Dr. Rae's testimony, pp. 226–8.

XX.—Even the physicians called by the plaintiff below, unite in testifying that it is not difficult to diagnose a case of delirium tremens.

Dr. Hunt, p. 282.

Dr. Katzenbach, p. 289.

XXI.—Davey's illness was a clear case of excessive alcoholism or delirium tremens. So says Dr. Watson, p. 17; Dr. Bruce, p. 36; Dr. Ward, pp. 206, 293; Dr. Phillips, pp. 209, 210. Drs. Hunt and Katzenbach do not say that it was not a case of delirium tremens; their strongest statement is that they could not say absolutely that it was (pp. 278–9, 287), though admitting that a physician *present* could easily have told whether it was or not.

They do not, therefore, contradict Drs. Watson and Bruce in the slightest degree.

XXII.—Drs. Watson and Bruce stand uncontradicted and unimpeached; they saw Davey and testify from personal knowledge. Not one of plaintiff's witnesses was present at the time they saw him exhibit the symptoms of delirium tremens. Not one of them except Mattoon arrived at Alexandria Bay until the day after Davey was found ill and delirious, and therefore cannot deny the fact and do not attempt to. Dr. Rae, on the contrary, testifies that he knows of no reason to doubt the accuracy of Dr. Watson's statement of his symptoms, and to that extent confirms it.

So also Drs. Ward and Phillips assert.

Dr. Ward's testimony, pp. 105–6.

Dr. Phillips' testimony, pp. 101–2.

XXIII.—All the testimony of those who were in any position to judge—the boatman who rowed him, the waiter who served him, the men who sold him liquor, the men who sat with him in his illness, the doctors who attended him and the physician who certified to the cause of his death—clearly proves the inordinate and excessive use by Davey of alcoholic liquor, and point to it as the cause of his death. Unquestionably he was ill, and to what else on the evidence can his illness be attributed but the inordinate and excessive use of liquor? It will be in vain to search the testimony for any other rational cause of death than the use of alcoholic stimulants. Unless some other rational cause can be pointed out on the evidence, the intemperate use of liquor as the cause cannot be set aside.

XXIV.—Observe the charge of the Court upon this subject:

"The defendants have, as they claim, placed before you by witnesses a photographic picture of Mr. Davey's life at Alexandria Bay during the last few days of his life. Starting with *the admitted facts that Mr. Davey was accustomed to a constant use of alcoholic spirits*, the defendants claimed they have proved to you just such an excessive use in August, 1881, as would naturally result in the impairment of health or in the inducement of delirium tremens. They rely on the testimony of Benson, Comstock, Lear, Dreyau, Duclone, Sykes, Dale, Ford, White, Hunt, Gibson, Albert Root, James Root, Senecal and a number of others. I shall not comment upon this evidence at all, it has been heard by you thoroughly, patiently and attentively. *These witnesses have certainly testified to a course of conduct on the part of Mr. Davey wholly inconsistent with the idea of a temperate use of liquor by him.* Some of these witnesses have been contradicted in minor parts of their story by witnesses for the plaintiff, *others seem to be, as I remember the course of the evidence, entirely uncontradicted.*"

XXV.—All of the evidence presented to Mr. Justice Bradley and District Judge Wales, on the motion for a new

trial after the second trial of the case, is before the Court at this time, with an additional body of important testimony, making the case before this Court even stronger than when considered by Mr. Justice Bradley, when the motion for a new trial was granted. The following is a portion of Mr. Justice Bradley's opinion at that time:

"The proof of the physician who attended the deceased in his last illness, and of others immediately around him, was so positive on this subject, and so free from contradiction, that it is difficult to conceive how the breach of the conditions could be proved, if it was not proved in this case. The evidence on the subject of his general habits was of a negative character, the witnesses never having seen the deceased intoxicated, and cannot outweigh the positive evidence. The Court is always reluctant to interfere with the verdict of the jury on this ground, and will not do so where the evidence is really conflicting, but if it is apparent that the jury disregarded the evidence and that they must have acted under some misapprehension or prejudice, it is the duty of the Court to correct their error, and set aside the verdict. We think that this was the case here."

XXVI.—A more extreme and outrageous case of disregard of clear, uncontradicted, and unimpeached testimony has never, we believe, been seen in a court of justice. What right had the jury arbitrarily to disregard such evidence and to declare that what the physicians all declared was delirium tremens, was *not* delirium tremens? That Davey did *not* drink the liquor which White and other uncontradicted witnesses testified he did drink, or that the amount of liquor which the physicians said *must* have impaired his health, did *not* impair it?

Third.—*The jury could have found for the plaintiff only by discrediting and absolutely disregarding uncontradicted and unimpeached testimony, and the Court erred in refusing to charge that there was nothing to justify the jury in disregarding this testimony, and in refusing even to instruct the jury that if they believed this testimony there could be no recovery for the full amount of the policy.*

I.—The Court was requested to instruct the jury (Assignment XLI., page 333) as follows.

"If the jury believe the evidence of White, Duclone, Dr. Watson and Dr. Bruce as to what occurred at Alexandria Bay in the summer of 1881, there can be no recovery for the full amount of the policy."

What, then, did the evidence, *if believed*, establish? It established that Davy, from the time he reached Alexandria Bay, consumed alcoholic liquor to the extent of about a quart of liquor daily; was intoxicated most of the time; was found ill in his room with an empty liquor bottle near him; told the physician he had been drinking freely, contrary to the caution of his physician, and that he supposed it was "all up with him now;" was suffering from delirium tremens, and within a few days thereafter death ensued, which was attributed by his physician to excessive alcoholism.

II.—Also (Assignment XLIV.):

"If the jury believe the evidence of Dr. Watson, Dr. Bruce and the evidence of Dr. Rae in connection with his certificate, there can be no recovery for the full amount of the policy."

This evidence established serious illness, confessed by Davy to be in consequence of having drank freely, with *delirium tremens* as a consequence and death as a termination, and finally a certificate of death presented by the

plaintiff and acted upon by the defendant, showing upon its face habitual intemperance and impairment of health therefrom.

III.—Also (Assignment XLVI.):

"If the jury believe the evidence of Dr. Watson, Dr. Bruce and White, there can be no recovery for the full amount of the policy."

White's testimony as to what occurred in the boat at Lear's, at Senecal's and elsewhere, showed the continuous and excessive use of liquor to the extent of at least a quart daily, and the testimony of Drs. Watson and Bruce showed a case of excessive alcoholism followed by *delirium tremens* and ending in death.

IV.—*If the jury believed* this testimony, no other conclusion was open than to declare that the condition of the policy that if the insured should "become so far intemperate as to impair his health or induce delirium tremens the policy should be void" was broken, and that there could be no recovery for the full amount.

The Court, it will be observed, proceeded to the extreme length of refusing to instruct the jury that *if they believed the testimony of these witnesses* there could be no recovery, which was in effect saying, that they could render a verdict for the plaintiff, even though they believed testimony proving gross intemperance followed by *delirium tremens* and terminating with death.

V.—The Court was also requested to instruct the jury (Assignment LXII., LXV. and LXVII.) that there was "nothing in the case to justify the jury in disregarding the evidence" of these witnesses. The Court replied declining to charge as requested because it was the duty of the jury to weigh the evidence.

"If after weighing the evidence," the Court said, "*you are satisfied with it*, undoubtedly your verdict will be for the defendant, but *if you are not satisfied with it* your verdict will be for the plaintiff."

From this instruction it was left for the jury to say whether they were *satisfied with it;* and if not satisfied with it they were entitled to disregard it and reject it, notwithstanding it was uncontradicted and unimpeached. This was an erroneous test. Any evidence, however clear, uncontradicted and unimpeached, might, if this test were true, be rejected because the jury *might not be satisfied with it.*

VI.—The proposed instructions referred to related to the testimony of four absolutely uncontradicted and unimpeached witnesses, viz.: Dr. Watson, Dr. Bruce, Dr. Rae, White and Duclone. Their testimony established gross intemperance. If their testimony was believed the jury could do nothing else but find a verdict for defendant, and there was nothing to justify its disbelief.

VII.—In this connection also the following charge of the Court (Assignment XX) was clearly erroneous, viz:

"I also charge you that you have the right, if you do not confide in the truth of Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis."

Why should Dr. Watson's testimony, supported as it is by Dr. Bruce, by the opinions of two eminent experts, and not contradicted or impeached, be rejected? Why should the jury be at liberty to find, with no evidence to support their finding, that what the physicians had declared to be a case of excessive alcoholism or delirium tremens was not a case of that character? Why should they be allowed to arbitrarily reject the diagnosis of a reputable physician who attended the patient in his illness simply because "they do not confide in it"?

The reason of the rule that juries cannot arbitrarily reject uncontradicted and unimpeached testimony not improbable in itself, applies as well to the testimony of an uncontradicted and unimpeached physician who attended the patient in his last illness and states that he died from

a certain disease as any other unimpeached and uncontradicted testimony.

It is submitted that the charge that the jury have a right to reject Dr. Watson's diagnosis "if they do not confide in it" was erroneous, there being nothing to contradict, discredit or impeach it.

VIII.—In this connection attention is again directed to the charge of the Court referring to these and other witnesses:

"These witnesses have certainly testified to a course of conduct on the part of Mr. Davey *wholly inconsistent with the idea of a temperate use of liquor by him.* Some of these witnesses have been contradicted in minor parts of their story by witnesses of the plaintiff. Others seem to be, as I remember the course of the evidence, *entirely uncontradicted.*"

IX.—So also Mr. Justice Bradley says:

"The proof of *the physician who attended the deceased in his last illness* and of others immediately around him was so positive on this subject and so free from contradiction *that it is difficult to conceive how the breach of the condition could be proved if it was not proven in this case.*"

The effect of the instructions was that *they might believe the testimony* and still find a verdict to the contrary, and that they might reject uncontradicted, unimpeached testimony *if they were not satisfied with it*, and reject the diagnosis of a trustworthy and reputable physician *if they do not confide in it.*

X.—Where unimpeached witnesses testify positively to a fact and are uncontradicted, their testimony must be credited; it is an error of law to refuse to instruct the jury to that effect.

This is settled law in the Federal Courts and in every State in the Union.

In Gunther *vs.* The Liverpool and London Globe Ins. Co., 134 U. S., 110, the duty of the Court with respect to testimony uncontradicted, unimpeached and not improb-

able in itself is plainly pointed out. Mr. Justice Gray says:

"But this conclusion was established beyond all reasonable doubt by the testimony of the two men whom he saw come out, the substance of which has been already stated and the accuracy and credibility of which is not impaired in any essential point by the thorough cross-examination to which they were subjected at the trial, or by the careful comparison with their testimony given before the Coroner's jury ten days after the fire and introduced in connection with their cross-examination. If the case had been submitted to the jury upon the testimony introduced, and a verdict had been returned for the plaintiff, it would have been the duty of the Court to set it aside for want of any evidence to warrant it. Under such circumstances, it is well settled that the Court was not bound to go through the idle form of submitting the case to the jury, but rightly directed a verdict for defendant. (Schofield *vs.* M. & St. P. R. Co., 114 U. S., 615, 619 and cases there cited; Robertson *vs.* Edelshoff, 132 U. S., 614, 626.)"

Mr. Justice Miller, in Pleasants *vs.* Fant, 22 Wallace, 116, says:

"It is the duty of a court in relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and evidence, from lapse of patience or prejudice, or from any other violation of his rights in the conduct of a trial. This is done by making plain to them the issues they are to try; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally when necessary by *setting aside the verdict* which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify the verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury; but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is clearly entitled to, is it sufficient to justify a verdict? If it is not, then it is the duty of a court after a verdict to set it aside and *grant a new trial.* * * * We hold the true principle to be that if the Court is satisfied that, conceding all the inferences which the

jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

In *Lomer* vs. *Meeker*, 25 N. Y., 362, the New York Court of Appeals said:

"The Judge, in this case, should, therefore, have nonsuited the plaintiff or dismissed the complaint, which is equivalent to a nonsuit. The argument is that this could not properly be done, because there was a question of credibility raised in respect to the witness Book, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the Court and jury to give credit to his testimony. *The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by Court or jury arbitrarily or capriciously.* They are bound to believe, for judicial purposes, such testimony, and it would, in an instance like this, be the clear duty of the Court to set aside the verdict of a jury founded upon a disbelief of clear, uncontradicted and undisputed evidence."

And in *Newton* vs. *Pope*, 1 Cowen, 110, the appellate Court says:

"The Justice had no right entirely and arbitrarily to disregard the testimony of two unimpeached witnesses on the ground 'that he was satisfied that they were biased in favor of the defendant.' There was no attempt to impeach their characters. The facts sworn to by them were not contradicted by any other witnesses either directly or indirectly; nor was there any intrinsic improbability in the narration given by them. It is difficult to establish a rule which shall limit the discretion of a court or jury in the degree of credit to be given to testimony of different witnesses. Much must depend on the principal circumstances in each case, but there is no difficulty in showing that where (as in this case) the *witness is unimpeached, the facts sworn to by him uncontradicted*, either directly or indirectly by other witnesses, and there is *no intrinsic improbability* in the relation given by him, neither the Court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than the jury to decide according to evidence, but it is

mockery to talk of evidence if it is to be discretionary with the tribunal to which it is addressed, to disregard it upon the vague suggestion, unsupported by proof, of the bias of the witnesses. Judgment reversed."

Fourth.—*All the testimony produced by the plaintiff is purely negative in its character, and not one of the witnesses who pretended to know anything of Davey's actual condition during the interval between his arrival and his illness, excepting A. C. Mattoon was at Alexandria Bay.*

I.—The important period of time to be investigated is the ten days before Davey's illness.

II.—Respecting those who saw Davey at Alexandria Bay, Dr. Rae's testimony relates exclusively to matters prior to Davey's visit, excepting that he was at Alexandria Bay from the noon of August 5th to the afternoon of August 6th, subsequent to Davey being seized with the fatal illness, and two or three days *after* his attack of delirium tremens, and in his certificate of death confirms defendant's contention that Davey was in the habit of using stimulants, and that they probably impaired his health.

III.—With respect to Mr. Mattoon. Although he was at Alexandria Bay during Davey's stay, he did not stop at the same hotel with Davey. From the date of the latter's arrival, July 23d, to Sunday, July 31st, he met Davey not more than four or five times during the week (fp. 260); was not in the boat with him; cannot and does not attempt to deny White's testimony as to the amount of liquor Davey drank; cannot and does not attempt to deny his drinking in the morning before breakfast, or his drinking several times in the afternoon and evening, or his drinking at Benson's, or Senecal's, or at the Island

View House. He admits he had very little occasion to go to the barroom; that he did not see him go out in the boat in the morning, or while he was on the water; that he did not see Davey from Sunday, July 31st, until after he was found sick, and consequently does not testify as to his condition on the intervening days, and cannot and does deny that two quarts of liquor—brandy and gin—were taken to Davey's room and drank by him on the afternoon of August 4th, the day before he was found ill.

IV.—A perusal of Mattoon's testimony will exhibit its absolutely flimsy and unreliable character, and it is entitled to no weight whatsoever. All that Mattoon's testimony amounts to at most is, that between July 23d and August 31st, 1881, he *did not see* Davey intoxicated, and that his opportunities for seeing him were limited to five or six times at the outside, and only then not more than twice for one hour, and the remaining times from thirty to forty-five minutes.

V.—This testimony of Mattoon's is purely negative and entitled to no weight in the presence of positive testimony of unimpeached witnesses to the contrary.

Culhame *vs.* N. Y. C. R. R. Co., 60 N. Y., 133.
McKeever *vs.* R. R. Co., 88 N. Y., 667.
Chapman *vs.* R. R. Co., 14 Hun (N. Y.), 485.
Tallman *vs.* Syracuse, &c., Co., 27 Hun, N. Y., 327.

VI.—With respect to Mrs. Davey it need only be said that she, too, was not at Alexandria Bay until after Davey's illness occurred—after he had exhibited the symptoms of delirium tremens to which Drs. Bruce and Watson testify, and not until the delirium had passed away and a dying condition had supervened. Dr. Katzenbach (her witness) testifies that acquiescent condition usually follows delirium tremens, and it is not singular therefore

that she did not see active delirium or extreme nervousness (p. 292).

VII.—On this subject, on the motion for a new trial in this case, speaking of these same witnesses, Mr. Justice Bradley said: "The evidence on the subject of his general habits *was of a negative character*, the witnesses never having seen the deceased intoxicated *and cannot outweigh the positive evidence.*"

VIII.—To the same effect is the following language from the charge: "The witnesses for the plaintiff say that they never saw Mr. Davey intoxicated or so under the influence of liquor as not to be able to attend to his business. *This testimony of itself does not negative or overcome the positive testimony of those who declared under oath that they had seen him intoxicated*" (p. 302).

In Tallman *vs.* Syracuse, &c., Co., 27 Hun (N. Y.), 327, eleven witnesses testified that they heard no bell or whistle sounded, although they were passengers on the defendant's train. Four witnesses (three of whom were employees of the defendant) testified that they did hear the bell and whistle. The trial Court charged as follows:

"I do not say that the evidence should not be considered, but I do say that the evidence of those who testify affirmatively that they *did* hear is to be given greater weight than those who simply say 'we did not hear.' All the evidence is to be weighed according to the circumstances of the case as shown by the evidence."

The jury found for the plaintiff, but on appeal the appellate tribunal unanimously reversed the judgment, holding that such negative testimony was entitled to *no* weight in the presence of affirmative testimony to the contrary, and did not create a conflict of evidence justifying the submission of the questions to the jury.

To the same effect are:

Cruikshank vs. *Fourth National Bank*, 26 Fed. Rep., 584.
Slocum vs. *Lurty*, Hemst., 431.
Stafford v. *Pawtucket & Co.*, 2 Cliff., 82.
Elwood vs. *Western Union Tel. Co.*, 45 N. Y., 553.
Robinson vs. *McManus*, 4 Lansing (N.Y.), 386.
Hariman v. *Insurance Co.*, 49 Wis., 71.
Berg vs. *R. R. Co.*, 50 Wis., 419.
Scott v. *Clayton*, 54 Wis., 499.
Langer vs. *Perley*, 47 Mich., 352.

Fifth.—*The Court erred in instructing the jury in effect that if they believed that the liquor drank by Davey was taken in good faith, for medical purposes and under medical advice, it was not a violation of the condition of the policy relatiny to intemperance. There was no evidence on which to submit that question.*

I.—The instructions alluded to are set forth in Assignment of Errors Nos. XXI., XXII., XXIV. to XXVI.

II.—It is supposed that these instructions are based upon the language of Mr. Justice Harlan in the opinion delivered in this case on the former writ of error, viz.: "If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants *not taken in good faith, for medical purposes or under medical advice*, his health was not impaired by intemperance within the meaning of the words 'so far intemperate as to impair his health.' It must be said, however, that no limitation or qualification of the condition dependent upon 'medical advice' or 'medical purposes' appears in the policy. It can only be by implication, reading into or grafting upon the language of the policy such limitation or qualification, and to that extent

altering the plain contract of the parties that it can be introduced in the case. There is nothing to indicate that the parties had any such limitation or qualification in mind when the policy was made, nor can it be asserted upon any basis of fact that the company would have agreed to any such limitation or qualification. Under the guise of 'medical advice' and 'medical purposes' the provision could in almost every instance be entirely nullified precisely as in innumerable instances within the range of common experience the use of liquor as 'medicine' or 'medicinally' is a frequent excuse for excessive indulgence. According to the policy it is not and ought not to be a valid excuse for the intemperate use of alcoholic liquor that it was taken under medical advice and for medical purposes. Reading words into the policy to the effect that intemperance is not intemperance if the intemperance is by 'medical advice' or for 'medical purposes' is, we submit, not only a plain alteration of the contract, but also a plain violation of the rule which requires courts to enforce contracts as made and forbids the making of contracts for the parties.

III.—But apart from this we insist that there is no ground whatever for asserting that the liquor was taken in good faith, under medical advice or for medical purposes, but, on the contrary, that it is indisputably and incontrovertibly established that it was taken in direct defiance of medical advice and medical caution, and with knowledge by Davey that it was so taken.

(1.) Upon the question of Davey's intemperance, the Court charged the jury, among other things, as follows:

> "These witnesses have certainly testified to a course of conduct on the part of Davey wholly inconsistent with the idea of a temperate use of liquor by him. Some of these witnesses have been contradicted *in minor parts of their story* by witnesses of the plaintiff; *others seem to be, as I remember the course of the evidence, entirely uncontradicted.*"

(2.) Again the Court charged as follows:

"I do charge you this way: There is nothing in the case, so far as I remember, *to justify the jury in finding* that the quantity of liquor which Davey, *according to the evidence of some witnesses*, drank at Alexandria Bay in the summer of 1881, *was taken in good faith for medicinal purposes.*"

These portions of the charge were clearly to the effect that uncontradicted testimony had established a course of conduct on the part of Davey inconsistent with the idea of a temperate use of liquor by him and that if the jury believed it there was nothing in the evidence to justify them in finding that such liquor was taken in good faith for medicinal purposes. Therefore if the jury believed this uncontradicted testimony as to Davey's excessive drinking, it followed under the instruction of the Court that there was nothing to justify them in finding that it was taken in good faith for medicinal purposes. How then, if they believe this quantity of liquor was taken, could it be left to the jury to say whether the liquor was taken according to medical advice and for medical purposes?

(3.) It was not only left to the jury in the teeth of entirely uncontradicted testimony produced by defendant, but, as it now remains to be shown, directly in the teeth of uncontradicted and unimpeached testimony that Davey himself knew and said that he knew that his drinking was excessive and contrary to medical advice and caution. On page 15 Dr. Watson testifies:

"He (Davey) then told me that he had been cautioned by his family physician, or that he had been drinking freely, and then afterwards told me that he had been cautioned by his family physician that if he persisted in having these times that he would have hemorrhages from his stomach and that they would probably kill him, and he said, 'There is the blood

and I suppose it is all up with me now '—these are the words he made use of."

On cross-examination, page 26:

"Q. In your examination on the former trial this evidence was given—I read from the book, page 90: 'What, if anything, did he say to you about his drinking alcoholic liquor? A. I don't know that I ever had any conversation with Mr. Davey about his drinking before that at all. Q. No; at that time. A. Just what I have stated—that his family physician had cautioned him in regard to having these little times in drinking; that he might expect, if he persisted in it, that he would have a hemorrhage of the stomach, or a hemorrhage—I don't know that he said stomach, but that he would have a hemorrhage. Q. That was your testimony, then. Is it correct? A. I presume so.'"

There is not a word in the case in contradiction of this testimony. If it establishes anything it establishes that Davey had been drinking freely, that he had been cautioned against drinking freely by his physician, that his physician had warned him that if he persisted in it he would have hemorrhage from the stomach and that it would probably kill him, and that he was conscious of his critical condition *from this cause* and said, "It is all up with me now." We submit that this evidence, uncontradicted, unimpeached, clearly and conclusively establishes that Davey not only did not claim to have taken it under medical advice, but admitted the taking of it was directly contrary to medical advice and caution, and that the theory that the liquor was taken under medical advice and for medical purposes is entirely fanciful and without a particle of foundation in fact.

(4.) The only evidence upon which this fanciful theory is argued is the testimony of Mrs. Davey. The Court in charging the jury upon her testimony said:

"That prescription was, *as Mrs. Davey gives it to us*, to take an egg with sherry wine in the morning and

a milk punch before retiring at night, and brandy and water if he needed it during the day. I leave it entirely for you to say whether if you believe the witnesses of the defendant and some of the witnesses for the plaintiff as to the habits of Mr. Davey in the use of intoxicating liquor for many years prior to his death you can conscientiously say and declare that such was a *bona fide* following of medical advice."

On cross-examination Mrs. Davey says:

"He told me the last thing at night to give him brandy and whisky, and then he said if he had any of those occurrences, hemorrhages, during the day to give him brandy and water and to give him sherry wine before breakfast with the yolk of an egg." Page 271 to 272: "Q. They told him to take liquor with milk or liquor with water? A. Yes, sir. Q. Any other form? A. No, sir. Q. No other form. They didn't tell him to take raw brandy? A. I never saw Mr. Davey take that. Q. I didn't ask that. They didn't tell him to take about one-third of a tumbler of raw brandy at once? A. No, sir; I don't think he ever took it. Q. They didn't tell him to take about a quart of brandy a day? A. Of course they didn't. Q. They didn't tell him to get intoxicated? Just answer the question? A. Why, of course they didn't."

IV.—As to his health in general, and the claim that he was then under medical treatment, the Court instructed the jury as follows:

"It nowhere appears, as I remember the testimony—of course you will correct me in this respect if I am wrong—that he was under medical treatment at that time or that he was afflicted with any special disease or complaint."

V.—We claim, therefore, confidently upon Davey's own statement to Dr. Watson, as well as upon Mrs. Davey's statement as to what was prescribed, coupled with her statement as to what was *not* prescribed, and the fact that he was not then under medical treatment, that Davey had abandoned any alleged prescription; was using

liquor to an extent which according to Mrs. Davey was not prescribed, and was proceeding in defiance of caution, warning and statement of the probable consequence by his physician. We submit, therefore, that the Court erred in leaving the question to the jury whether the amount of liquor which Davey drank was taken according to medical advice and for medical purposes.

Sixth.—*The Court erred in instructing the jury as follows*:

"If the jury should believe that the efficient, controlling cause of the death of William A. Davey was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medical purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens."

I.—To warrant the jury in believing that the excessive and continuous use of strong drinks for several days and nights preceding his death, and which were the "efficient cause of his death," was in good faith for medical purposes, *some* evidence at least was essential on which to base that belief. There is not a *scintilla* of evidence that this excessive and continuous use—*the efficient and controlling cause of death*"—was the following out of any medical advice or for medical purposes.

II.—The Court had already, as has been seen, instructed the jury that according to the testimony of some uncontradicted witnesses a course of life on the part of Mr. Davey had been proven wholly inconsistent with the idea of a temperate use of liquor by him, and that if they believed the testimony of these witnesses as to the amount

of liquor which Davey drank, there was nothing to justify the jury in finding that it was taken in good faith for medicinal purposes. The charge above referred to was in plain contradiction of what had just been stated, and was not only misleading to the jury, but a palpable error in law.

III.—No greater intemperance had been contended for on the part of the defendant than "that the efficient, controlling cause of the death of William A. Davey was the excessive and continuous use of strong drinks for several days and nights immediately preceding death."

Note the force of these expressions "efficient" and "controlling" cause of death, leaving one thing, and one thing only, as the "efficient and controlling cause," to wit: the use of strong drinks. To what extent? *Excessively* and *continuously*. For what duration? *Several days and nights*. Not a single day and night, but *several*. Not during the day only, but *days and nights*. Up to what point? Immediately preceding his death. And yet such a use, quite as marked and excessive as any defendant had claimed, would not be a violation of the condition of the policy if the jury believe it was taken in good faith for medical purposes under medical advice, although there was not a particle of evidence on which to form such belief. The Court had just said that, if they believed the testimony of witnesses *proving no greater intemperance*, there was nothing to justify the jury in finding that it was taken in good faith for medicinal purposes.

IV.—We respectfully contend that this instruction was clearly erroneous.

Seventh.—*The Court erred in instructing the jury that "The weight of evidence must decidedly preponderate on the side of the defendant."* (*Assignment LX.*)

I.—The Court had charged that the burden of proof was upon the defendant, and granting this instruction to

be correct, the duty of the defendant was only to satisfy the jury of the truth of its defense by a *preponderance* of evidence. But when the Court not only instructed the jury that the burden of proof was upon the defendant, but that the weight of evidence must "*decidedly*" preponderate on the side of the defendant, the Court fell into an error.

II.—"Decidedly" is defined by lexicographers to mean: In a decided manner, "clearly," thoroughly, "indisputably." The word implies clearer, more decided and indisputable evidence than a simple preponderance of evidence. The instruction was misleading to the jury, and under it they might well have concluded that even though the evidence preponderated in favor of the defendant, yet if it did not *decidedly* preponderate the defendant could not have a verdict. This instruction of the Court we submit was erroneous.

Lewis vs. *Merritt*, 113 N. Y., 386.
Stearns vs. *Field*, 90 N. Y., 640.

Eighth.—*The Court erred in refusing to instruct the jury that "there is nothing in the case to justify the jury in finding that Davey, in the summer of* 1881, *had a sunstroke," and in leaving it to the jury to say "whether he was suffering from exposure to the sun or sunstroke, or whether he was suffering, as the other witnesses testify, from alcoholism or the other diseases named."* (*Assignments, LV., LVI.*)

I.—There was not a particle of evidence of sunstroke. Dr. Watson testifies, page 39: "Q. Have you any doubt in your mind of what he was suffering from at that time? A. Not the least particle of doubt. Q. And what in common language, ordinary language, do you call that disease that he was suffering from—the ordinary every-day term?

A. I should call it nervous irritation or delirium tremens. Q. You have been asked some questions about sunstroke; did you see any evidence at all of sunstroke or hear anything about sunstroke connected with this illness? A. I heard nothing said about sunstroke." Dr. Bruce testifies, page 39: "Q. Did you ever hear of any sunstroke in connection with Mr. Davey? A. Not until I came to this Court."

II.—Not one of the witnesses testify to any sunstroke. White, his boatman, was not inquired of on that subject and there is not even a scintilla of evidence in support of this theory. The only allusion anywhere to the sun is in Dr. Rae's certificate, when asked as to cause of death, wherein he states: "Exposure to the sun and cirrhoris of the liver." But no one testifies to the fact, and Dr. Rae's statement is either a mere guess or else no more than hearsay. A verdict that he came to his death from exposure to the sun or sunstroke would be absolutely without evidence to support it, and therefore, leaving it to the jury to say whether his death was from sunstroke or not was plainly an error.

Ninth.—*The Court also erred in refusing to charge as follows: "To establish a breach of the condition of the policy, 'became so far intemperate as to impair his health,' it is not necessary to satisfy the jury that his health was impaired to the extent of causing his death"* (*Assignment LI.*). *And also in instructing the jury that they "ought to gather from all the testimony in the case what was the cause of death"* (*Assignment XVI.*).

I.—We submit that there is no such issue in the case as what was the cause of death. The condition of the policy is not to the effect that *death* should be caused by intemperance or delirium tremens, but simply that if the in-

sured should become so far intemperate as to impair health or induce delirium tremens it should be void. It is plain that what is aimed at is impairment of health and delirium tremens—not death.

II.—Intemperance might well impair health, but not to such an extent as to cause death. So, also, intemperance might induce delirium tremens, but not to such an extent as to cause death from delirium tremens; but if impairment of health or delirium tremens result from intemperance, although they may not cause death, clearly the condition of the policy is broken because the insured has become thereby "so far intemperate as to impair his health or induce delirium tremens."

III.—This error runs through the entire charge of the Court, as, for instance, on page 297 the Court says: "The great contention in the case commences just at this point—what was the cause of that illness and presumably the cause of his death?" And again (page 301): "If it be true and you believe it, it must go far towards satisfying your mind as to the cause of Mr. Davey's death."

Tenth.—*The certificate of Dr. Rae to Davey's intemperance and impairment of health therefrom, having been furnished to defendant by Mrs. Davey as a part of the proofs of death, and offered as a part of her evidence on the trial, it was her duty, in order to avoid its effect as establishing Davey's intemperance, to produce evidence to explain, correct or overcome it, and the Court, therefore, erred in instructing the jury to the contrary.*

I.—The Court was requested to charge—

"that said paper having been introduced as evidence on behalf of the plaintiff, taken in connection with Dr. Rae's

testimony, establishes that the said Davey was in the habit of using stimulants and that they probably impaired his health" (fol. 506).

The Court replied:

"It is a question solely for the jury, and they must determine what the paper and the evidence amount to. It is not for the Court to lay down what the evidence means; it is your province alone."

Again: The Court was requested to charge—

"The burden of explaining or correcting said certificate rests on the plaintiff."

Again:

"In order to overcome the statements in said certificate by the correction or explanation of the same, the plaintiff must establish to the satisfaction of the jury by a preponderance of evidence that Dr. Rae was mistaken in his statements therein, and in determining said question the evidence of Dr. Rae that he adheres to the statements contained in it and the evidence offered by defendant tending to confirm the statements of Dr. Rae therein must be taken into consideration, and unless the plaintiff overcomes said certificate of Dr. Rae as well as the defendant's testimony supporting it by a preponderance of evidence, the plaintiff has failed to correct or explain said certificate" (fol. 507).

The Court replied:

"I decline to charge that except as I have charged you originally upon the weight of evidence, to wit, the weight of evidence in this case is upon the defendant."

Again: The Court was requested to charge—

"The certificate of Dr. Rae must be overcome by the plaintiff to justify a recovery as claimed" (fol. 511).

II.—We contend that the refusal to give these instructions, and the instructions as given upon the subject were erroneous. Referring to the course of evidence on the

trial, it will be seen that the contract sued upon becomes void in case the insured becomes "*so far intemperate as to impair his health or induce delirium tremens.*" Under that contract it appears that the plaintiff furnished to the defendant as proof of death and of a compliance with the condition of the policy, papers constituting proofs of death, and among them a physician's certificate. These papers when offered in evidence as a part of the plaintiff's case disclosed the fact that the physicians certify in effect to intemperance and impairment of health therefrom. Thus, the situation of the case at the close of plaintiff's proofs is the fact of the issuance of a policy conditioned upon the insured not becoming so far intemperate as to impair his health or induce delirium tremens, the fact of the habitual use of stimulants and the impairment of health therefrom and the death of the insured.

III.—Before the plaintiff was entitled to a verdict it was, we submit, her duty to avoid in some way the force of evidence introduced by her proving a fact which established a breach of one of the conditions of the policy, and it was not necessary, we contend, that the defendant should introduce any evidence to prove the defense until the facts disclosed by the certificate were explained, corrected or overcome, because those very facts established its defense.

IV.—No proof whatever was offered by the plaintiff to explain, correct or overcome the certificate. No claim was made that Dr. Rae was mistaken or misinformed or that the habits of the insured and the cause of death were otherwise than as stated. More than this, the testimony of Dr. Rae, who made the certificate and who was called by the plaintiff as one of her witnesses, is clear, distinct and decisive that he adheres to the statement of the certificate; that he knew from conversation with Davey that he was in the habit of drinking, and that it was his opinion at that time that they impaired Davey's health (pp. 226, 227).

V.—The certificate was doubtless open to explanation and correction. It was not claimed to be conclusive. It is not necessary to claim more than that it was *some* evidence of the facts contained in it, and being evidence of those facts and introduced by the plaintiff as a part of her case, and as furnishing proof of facts which, unexplained and uncorrected would defeat her case, we insist that it was an error in the Court to refuse to instruct the jury as above requested, and particularly in refusing to instruct that "The certificate of Dr. Rae must be overcome by the plaintiff to justify a recovery as claimed."

Eleventh.—*The Court erred in refusing to charge the jury that the physician's certificate of death, furnished to the company by the plaintiff, was prima facie evidence against the plaintiff* (page 331), *and in charging that the same was not prima facie evidence* (p. 332).

I.—By this ruling the Court, in effect, instructed the jury that the certificate was not entitled to any probative force whatever—not even *prima facie* evidence—except as a mere expression of opinion. Upon the language of the contract and upon a line of well considered authorities, this ruling was incorrect.

II.—As to the contract itself. The amount insured became payable according to the policy within ninety days after due notice and proof of the death of said insured during th continuance of said policy (page 313). In conformity with this provision, the plaintiff, between August 11th and 13th, 1881, caused certain papers constituting proof of death, including physician's certificate of cause of death, to be prepared and verified, and on August 16th they were served on the defendant.

III.—It was incumbent on the insured on furnishing such proof not only to show the fact of death, but death

of the said insured *during the continuance of said policy.* By the terms of the policy it was to become null and void in case any of the conditions contained in the third paragraph of the policy should be violated, and hence it was the duty of the insured to furnish *some* proof to afford reasonable assurance that the liability for loss existed.

Goldschmidt vs. *The Mutual Life Insurance Company,* 102 *N. Y.*, 491.

Covenant Mutual Benefit Association vs. *Hoffman* 110 *Ill.*, 602.

Besides, it was affirmatively proven that the physician's certificate was invariably required as part of the proofs of death, and that no claims were paid until such proofs were furnished (p. 31).

IV.—The defendant claims that this certificate having been furnished as a part of the proof of death, established *prima facie* that the insured was in the habit of using alcoholic stimulants, and that they impaired his health, and was entitled to be used as evidence of the fact.

V.—As to the authorities. In Insurance Company *vs.* Newton (22 Wallace, 32), where the company offered as evidence the preliminary proofs of the death of the party insured, and which the Court excluded, the Supreme Court, through Mr. Justice Field, said:

"And independently of this position, the proofs presented were admissible as representations on the part of the party for whose benefit the policy was taken as to the death, and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance. They were intended for the action of the company, and upon their truth the company had a right to rely."

VI.—In Connecticut Mutual Life Insurance *vs.* Schwenck (94 U. S., 593), where a certificate was presented in connection with the proofs of death as to the age

of the party insured, the Supreme Court, through Mr. Justice Strong, said:

"In considering the ruling of the Court it has first to be observed that nothing in the policy required that proof of the death of the person whose life was insured should be accompanied by proofs of his age at the time of his death. There was, it is true, a memorandum endorsed on and folded in the policy that a certificate would be required from some intimate friend of the age of the person insured at the time of his death, but the memorandum was not part of the contract, and it was not shown to either the Court or jury by the counsel before the verdict was rendered. Nolan's affidavit, therefore, was not necessarily a part of the proofs of death, and hence it was immaterial, *yet having been furnished by the plaintiff to the defendant, it was some evidence of the age of the person insured, though certainly not conclusive.*"

VII.—In Insurance Company *vs.* Higginbotham, 95 U. S., 380, the doctrine of Insurance Company *vs.* Newton, 22 Wallace, 32, was reaffirmed, and the following cases all sustain the position that the certificate was evidence.

New York Central Insurance Company v. *Watson*, 23 Michigan, 486.

Day v. *Mutual Benefit Life Insurance Company*, 1 *McArthur's Reports, D. C.*, 598.

Walther v. *Mutual Life Insurance Company*, 65 *Cal.*, 417.

Connecticut Mutual Life Insurance Company v. *Siegle*, 9 *Bush*, 452.

Twelfth.—*The judgment should be reversed and the cause remanded for a new trial.*

WAYNE MACVEAGH,
THERON G. STRONG,
Of Counsel for Plaintiff in Error.

EVENING POST JOB PRINTING OFFICE—N. Y.

Office Supreme Court U. S.
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DEC 8 1890
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

THE ÆTNA LIFE INSURANCE COMPANY,
Plaintiff in Error,

AGAINST

ADA WARD (formerly Ada Davy),
Defendant in Error.

No. 1388.

October Term, 1890.

Answer to Motion to Advance under Subdivision 4 of Rule 26.

I.—The statement in the motion filed in this Court that "by reason of delays interposed by the defendant or for which it was responsible (the suit) was not brought to trial until January, 1884," is quite misleading. If it were necessary, it is possible to demonstrate that the defendant below has occasioned no delay whatever, but has been invariably ready to proceed with the trials and arguments of the case whenever the same has been called.

II.—The action was brought into this Court on a writ of error to review certain alleged errors in the charge of the Court to the jury. By a reference to the opinion of Mr. Justice Harlan, as reported in 123 U. S., 739, it will be found that the only question considered and decided was as to the interpretation of a portion of the third paragraph of the policy sued on, as follows: "Or if the insured shall become so far intemperate as to impair his health or induce delirium tremens * * * the policy shall be null and void," &c. The judgment was reversed upon the ground that the Court below misinterpreted that provision in charging the jury. It is, therefore, apparent that the real merits of the case were not taken into consideration, but only the question of interpretation. While this probably was, in a technical sense, a hearing upon the merits, yet it is submitted that it was not in a real and true sense a hearing upon the merits within the spirit of Subdivision 4 of Rule 26.

III.—A second trial took place on very much stronger and additional testimony for the defendant below in March, 1889, which resulted in a verdict for the plaintiff below, but on a motion for a new trial, before Mr. Justice Bradley, presiding, and District Judge Wales, the verdict was set aside as against the evidence, Mr. Justice Bradley delivering an opinion, in the course of which he said:

"The proof of the physician who attended the deceased in his last illness, and of others immediately around him, was so positive on this subject and so free from contradiction that it is difficult to conceive how a breach of the condition could be proved if it was not proven in this case. The evidence on the subject of his general habits was of a negative character, the witnesses having never seen the deceased intoxicated, and cannot outweigh the positive evidence. The Court is always reluctant to

interfere with the verdict of a jury on this ground, and will not do so where the evidence is really conflicting. But if it is apparent that the jury disregarded the evidence, and that they must have acted under some misapprehension or prejudice, it is the duty of the Court to correct their error and set aside the verdict. We think that this was the case here."

IV.—A third trial having taken place in March, 1890, with a verdict for plaintiff below as before, the judgment was brought into this Court on a writ of error. It should be stated that the record has not yet been printed and that the cause is at present in no condition to be heard, nor until the record is printed and a reasonable opportunity afforded counsel to prepare and file briefs.

V.—But upon the merits of the motion it is respectfully submitted that there are no "imperative reasons" why the case should be advanced.

In Carter *v.* Greenhow, 107 U. S., 64, Mr. Chief Justice Waite stated the practice of the Court on motions to advance under Rule 26, in the following words:

"Practically every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order, except for imperative reasons."

The reasons urged for advancing the case are three:

1. The length of time consumed in the litigation. 2. The desirability of a decision during the lifetime of defendant in error; and 3. The death of some of her witnesses and the age and infirmity of others.

We respectfully contend that these are in no sense imperative reasons, nor are they reasons which do not appertain to the vast majority of cases which have once been heard on the merits.

If the length of time consumed in this litigation is a reason for advancing the case, the same reason would apply as well in every case. So also the desirability of a decision in the lifetime of the defendant in error applies to every other case which comes up for re-hearing, in this or any other Court; and as to this particular defendant in error, it may be said, without fear of contradiction, that she is not past middle life, and is certainly of more than average health and vigor, with no greater immediate prospect of departing this life than appertains to humanity in general. The third reason urged—namely, the death of "some" and the age and infirmity of other of the witnesses, furnishes no imperative reason for advancing the case, because in case of death the testimony of these witnesses can be read at any subsequent trial and the defendant in error will not be and cannot be deprived of their testimony. Besides, it is not the fact that *some* of the witnesses have died;—only one has died since the first trial and the testimony of that witness was not considered of sufficient importance by the plaintiff below to offer to read it on either the second or third trial. We deny that more than *one* witness of any importance is aged and that this witness is infirm we emphatically dispute, but on the contrary assert that he is of uncommon and extraordinary bodily health and vigor with the prospect of many years of life before him.

VI.—We therefore respectfully submit that this case is not within the rule of Carter *vs.* Greenhow (*supra*), because no "imperative reasons" exist for advancing the same. It is far more likely that

greater injustice would be done to suitors by advancing cases on such unimportant grounds and thus postponing the hearing of other cases on the docket, than by requiring that this case should await its turn in the regular call.

THERON G. STRONG,
Of Counsel for Plaintiff in Error,
45 William Street,
New York.

Office Supreme Court, U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES,

October Term, 1890.

No. 1,388.

THE ÆTNA LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT,

Plaintiff in Error,

vs.

ADA WARD, WIFE OF CHARLES D. WARD (FORMERLY ADA DAVEY),

Defendant in Error.

BRIEF OF JOHN LINN,

Counsel of Defendant in Error.

JERSEY CITY:
JERSEY CITY PRINTING COMPANY'S "RAPID" PRINT, 37 MONTGOMERY ST.

1891.

Supreme Court of the United States.

THE ÆTNA LIFE INSURANCE CO., OF HARTFORD, CONNECTICUT,
Pff. in Error,
vs.
ADA WARD (WIFE OF CHARLES D. WARD) FORMERLY ADA DAVEY,
Deft. in Error.

Brief of John Linn, Counsel of Defendant in Error.

This cause has come to this court the second time, after three successive verdicts in favor of the defendant in error. It is to be heard now upon exceptions taken to the rulings of the Circuit Court at the last trial. If in an examination of the case any error should be found in these rulings, prejudicial to the plaintiff in error and to which exception was duly taken, then the case may go back again to the Circuit for a fourth trial. If, however, the rulings of the court shall be found to be substantially correct in point of law, so that the plaintiff in error has had a fair trial, then the judgment in favor of the defendant in error will be allowed to stand and a final conclusion reached in this case after the lapse of so many years of expensive litigation.

There are *sixty-six* exceptions and assignments of error to be disposed of, enough, one would suppose, to cover the whole case with every material and immaterial point which it contains.

At the risk even of being tedious and wearying the

court, it seems to me we must take up these exceptions and assignments of error singly, or in groups as they may relate to one subject, and present them as they arose in the court below, and thus aid the court, as much as possible, in ascertaining if there be any error pointed out in this multitude of exceptions and assignments.

First. The *first* exception and assignment of error is to this question, "What did he (the President of the Ætha Life Insurance Company) say in reference to having received notice and proofs of death and their intention to pay or not to pay?"

This question occurs on page 13 of the printed case.

If the question was intended to elicit evidence of an admission by the company that it had received proof of loss, why should it not be competent for that purpose? The admission of the president of a corporation having knowledge, or presumably having knowledge, of its affairs, that it had been served with a notice of this character, clearly ought in reason, to be competent evidence of such fact.

But whether such be the case or not, the answer did not and could not in the least degree prejudice the plaintiff in error, because the fact so sought to be shown was unquestionably proven by the submission in evidence of all of the papers called the proofs of loss which were in the possession of the company and produced by its counsel. (See page 14.)

The question of intention was entirely immaterial, and could neither aid the one party nor injure the other.

This objection and assignment of error seems to us to be entirely frivolous.

"We concede that it is a sound principle that no judgment should be reversed in a Court of Error when the error complained of works no injury to the party against whom the ruling was made." *Deery* v. *Cray*, 5 *Wall.*, 807. December Term, 1866.

Cooper & Co. v. *Coates & Co.*, 21 *Wall.*, 111. October Term, 1874.

Lucas *v.* Brooks, 18 Wall., 454.

Second. The *second* exception and assignment of error thereon, is that the court erred in allowing Dr. Watson to answer the following question, put to him on cross-examination by the counsel of the defendant in error:

"Do physicians prescribe alcohol to be taken sometimes in quite considerable quantities?" This appears on page 21.

Why should this question not have been answered? Because it was immaterial? If so, then how could the plaintiff in error be prejudiced by it? And if it could not be prejudiced is not the exception and assignment of error frivolous?

Third. The *third* exception and assignment of error thereon, is that the court erred in refusing to overrule Dr. Rae's answer to the question put to him by the defendant in error, his answer being "I did not see him exposed to the sun. I was told that he had been exposed to the sun." This is found on page 223.

The witness in certifying as to the cause of Mr. Davey's death, in answer to the question, "What was the indirect cause of his death?" had said "exposure to the sun and cirrhosis of the liver;" and now being asked in explanation of this answer, "Do you know that he had been exposed to the sun?" replied to this "I did not see him exposed to the sun. I was told that he had been exposed to the sun."

The objection to this is that it is hearsay. But this was not offered to prove the fact that he had been exposed to the sun, but only in explanation of Dr. Rae's answer in the certificate as to the cause of death. It is as if he had been asked "Why did you say one cause of his death was exposure to the sun," and he had answered, "Because I was told he had been exposed to the sun."

Will any sensible person pretend that this answer is hearsay evidence in that sense which requires its exclusion from the record?

It seems to us that a simple statement of the matter is a complete answer to the objection of the plaintiff in error.

Fourth. The *fourth* exception upon which an assignment of error is founded appears on page 224. It is to the question put to Dr. Rae, "Why did you give that certificate stating that the indirect cause of death was exposure to the sun and cirrhosis of the liver?" The doctor had certified that direct cause of his death was "exhaustion from hematimesis, and now in answer to this question as to the indirect cause of death, he replied that he had so stated because hemorrhage of the stomach, that is hematimesis, might be produced by either one of those, that is by exposure to the sun or by cirrhosis of the liver.

Now is it possible to point out any reasonable grounds for the objection of that question? Was it material or immaterial? If either, how could the plaintiff in error have been prejudiced by it? Certainly this court does not sit here to consider matters of trifling import, nor to reverse judgments and send causes back for re-trial, unless some real substantial injustice, in the application of rules of law, has been done to the party complaining.

Fifth. The *fifth* exception on which an assignment of error is based, is found on page 229.

The question put to Dr. Rae was, "From whom did you receive information upon which you based that certificate?"

This exception and assignment of error seems to us so utterly frivolous that we deem it only necessary to call the attention of the court to that part of the case where it appears, in order that its shallowness may be seen at a glance.

Sixth. The *sixth* exception upon which an assignment of error is based, is found on page 257. Mr. A. C. Mattoon, a gentleman seventy-five years of age, being produced as a witness on the part of the defendant in error, with a view possibly of showing that age, at least, had not impaired his faculties so that his memory, or his statements upon the witness stand, could not confidently be relied upon, was

asked, on direct examination, the harmless question (page 249), in what business he was engaged. His answer shows the various things which occupied his time and attention, and is calculated to impress one with the clearness of his intellect, and, in this regard at least, with the full reliability of his testimony. Upon cross-examination then (page, 256-257) the plaintiff in error inquired of the witness how long he had owned the real estate of which he had spoken, and then sought to show that what he said in regard to that could not be true, because in some examination twelve or fifteen years previously he had testified differently as to such ownership. This line of examination was stopped before the witness could answer as being an improper way of impeaching a witness.

This was clearly raising another issue, and if allowed might be continued *ad infinitum*.

The plaintiff in error having asked Mr. Mattoon how long he had owned this real estate, it being entirely a collateral matter, was concluded by his answer, and would not be allowed in any way to contradict him, if it could do so.

1 *Greenleaf on Evidence*, Section 449.
1 *Wharton's Evidence*, Section 559.
2 *Taylor on Evidence*, Sections 1,443, 1,444, 1,445.

Seventh. The assignments of error which are numbered *seventh*, *ninth*, *tenth*, *eleventh* and *twelfth* may properly be grouped and considered together. There is no assignment numbered 8, in the record.

These exceptions all relate to the inquiry, whether Mr. Davey took alcoholic stimulants for medical purposes or under medical advice, and whether they had been prescribed for him by his physician.

When this case was before this court on a former occasion (123 U. S. S. C. 739), the court had said (pages 743-744) that "if the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, *not taken in good faith for medicinal purposes or under medical advice*, his health was impaired by intemper-

ance, within the meaning of the words 'so far intemperate as to impair his health, etc.'"

Now for the purpose of showing, as far as possible, that the alcoholic stimulants which he did take were taken in good faith for medicinal purposes and under medical advice, the questions embraced in these exceptions were asked of Mrs. Ward, who had been his wife and widow.

The questions are, "Did he take them under medical advice?"

"Did he, or not, take them for medicinal purposes?"

"Now, Mrs. Ward, you may answer that question whether when you visited Dr. Kelleman with your husband he prescribed for him?"

"Did Dr. Rae ever prescribe for your husband in your presence and in his presence?"

"Among other things, what did he prescribe?"

These questions will be found upon pages 264-269 and 270 of the printed case.

Why should they not have been answered?

In view of the decision of this court, were not such inquiries material?

If he took alcoholic stimulants, did it make no difference whether he took them in good faith, for medical purposes, or under medical advice, or not? Very evidently this court thought it did make a difference. And acting under this opinion of the court, the defendant in error sought to show that the stimulants which Mr. Davey did take were taken according to medical advice and for medical purposes. With this view these questions were put to the witness. Who was more competent to speak of these things than the wife and widow of the deceased? She had heard the physicians prescribe for him again and again, had seen him take the medicines, and had herself administered them to him. The physician, Dr. Kelleman, being dead, how could the fact of prescription be proved in any other way?

We think it impossible to conceive of any real, sound objection to any of this testimony.

Eighth. The *thirteenth* assignment of error is that the court "erred in allowing an answer to the question to the witness James H. Hunt, which question was in the following words: 'I want to ask the doctor this, whether he can say what was the cause of death in that case'—to go upon the record, and especially in accepting as the answer of the witness, without his actually answering the same, the following statement of counsel for the defendant in error:

"Mr. LINN: That may be. The symptoms which this man exhibited were such that a physician without an autopsy could not tell from what he died.'"

This whole matter is found upon pages 278 and 279 of the printed case.

If the stenographer has this correctly reported, it seems clear now that neither one of the counsel, nor the witness, had a clear conception either of the question asked, or the answer sought, or of the particular matter intended to be excepted to. The whole thing is in a state of obscurity and confusion, and there does not seem to be much sense to it anyway.

A hypothetical question had been put to the doctor, and it is manifest that the object of counsel was to have him say what, in his opinion, would be the cause of death in such a case as that described and embodied in the hypothetical question. It is possible that the doctor so understood it, and that his answer, or that suggested by counsel and accepted by him, was in substance that he would be unable to tell without an autopsy. This is the most that can be made of it. But to what the exception was intended to apply, whether to the question or the answer, or the failure to answer distinctly in the language of the witness himself, it is impossible to tell.

Certainly where an exception is taken in such a manner as not clearly to indicate the subject matter excepted to, there can be nothing which will justify the higher court in reversing a judgment founded upon proceedings in which such exception occurs.

What was said by the Court in the case of *Camden* v. *Doremus*, 3 *How.*, 530, where after the reading of a depo-

sition the defendant, by his counsel, objected, and his objection was overruled, may be quoted here with striking force and effect as peculiarly applicable to the exception we are now considering. It was as follows:

"With regard to the manner and the import of this objection, we would remark, that they were of a kind that should not have been tolerated in the court below, pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not, or could not, point to their view. It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere, certainly, as without weight before an appellate court."

Ninth. The *fourteenth* assignment of error is that the court erred in allowing Dr. Katzenbach to answer the same hypothetical question, which had been put to Dr. Hunt.

The question and the exception and the answer appear on pages 286 and 287 of the printed case.

It is manifest that this question was intended to present to the mind of the witness a case showing such a

history and such symptoms as appeared in the life and sickness and death of Mr. Davey, and to ascertain from him whether it was possible to speak with certainty as to the cause of death, or to pronounce it a case of alcoholism or delirium tremens.

The answer of the witness stated that he could not positively. The assignment of error is not that the question was allowed to be put to the witness, but that it was allowed to be answered.

If this question did fairly embody the symptoms occurring in Mr. Davey's case, then no one will seriously contend that it should not have been put to the witness, or that it should not have been answered.

If it does not fairly embody and represent those symptoms, then how can it be said that the question itself, or the answer to it, could possibly injure the plaintiff in error. And if not, there is no legal ground upon which it can be considered by this court.

Tenth. The *fifteenth* exception and assignment of error thereon, is that the court erred in refusing, at the close of the evidence, to direct a verdict for the defendant below, the plaintiff in error.

This is found upon page 294 of the printed case, and the *fifteenth* assignment of error presents the same question as that substantially presented in the *thirty-ninth*, *fortieth*, *forty-first*, *forty-second*, *forty-third*, *forty-fourth*, *forty-fifth*, *forty-sixth*, *forty-seventh*, *forty-eighth*, *forty-ninth*, *fiftieth*, *fifty-second*, *fifth-third*, *fifty-fifth*, *fifth-sixth*, *fifty-seventh*, *fifty-eighth*, *sixty-fourth*, *sixty-fifth* and *sixty-sixth* assignments of error, pages 332, 333, 334 and 336 of the printed case.

They all relate to the weight and effect of the evidence, and require the court to instruct a jury in positive terms what their verdict must be.

If this court were sitting here as a trial court to weigh the evidence, to consider the facts, and give such judgment upon the merits of the case as in their consideration the facts would warrant, or in other words, if this court will assume the province of the jury, and under-

take the performance of the duties committed by law to that tribunal, then we might consider these exceptions and these assignments of error, and re-argue the case here as it was argued before the jury. But this duty this court absolutely repudiates, as abundantly appears from its decisions here following:

"An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and retrial; but a *writ of error* is a process of common law origin, and it *removes nothing for re-examination but the law.* It is observed that a writ of error is a process more limited it its effect than an appeal." *Wiscart* vs. *Dauchy*, 3 *Dallas*, 327. February Term, 1796.

"The defendants pleaded the general issue; and upon the trial, after the whole evidence upon both sides had been given in, the court, upon the prayer of the defendant's counsel, instructed the jury, 'upon *the whole evidence in the case*,' as stated; the plaintiff's are not entitled to recover, and the verdict of the jury ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court upon the ground that the opinion already given disposed of the whole cause upon its merits. If that opinion was correct, this refusal was entirely justifiable; for the court was under no obligation to discuss or decide other points, when the plaintiff's case was already shown to possess a fatal defect.

"The general question, then, before this court, is upon the propriety of the instruction so given to the jury. * * * * * * It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed there were no disputable facts or inferences proper for the consideration of the jury upon the merits; and that, upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view that it is open for the

consideration of this court; and, in this view it will now be discussed, as it was discussed in the argument at the bar."

The court then proceeding to consider the grounds presented to justify the opinion of the Circuit Court, said:

"It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it, are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the Appellate Court. The directions of the court must then stand or fall upon their own intrinsic propriety as matters of law. * * * * * * * * * * The court may aid the judgment of the jury by an exposition of the nature, bearing and pressure of the facts, but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law. * * * * For these reasons the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to award a *venire facias de novo*." *McLanahann* v. *The Universal Ins. Co.*, 1 *Peters*, 182. Opinion by Story, *J.* January Term, 1828.

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been

watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union. * * * * * * * * * * * As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than *according to the rules of the common law.* * * The only modes known to the common law to re examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings. * * * Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial, the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed."

Parsons v. *Bedford*, 3 *Peters*, 446, *et seq.*
Opinion by Story, J. Jan. Term, 1830.

"The finding of the jury on the whole evidence in a cause, must be taken as negativing all facts which the party against whom their verdict is given has attempted to infer from or establish by the evidence."

Hepburn v. *Dubois*, 12 *Peters*, 376. *Jan. Term*, 1838.

"It seems to have been supposed that the above agreement of the counsel, that the evidence in the cause should be considered as a statement of facts, subject to all legal objections, though no objections were stated, was sufficient ground for a writ of error on which a revision

of the legal questions in the case might be made in this court.

"In this view, the writ of error must be considered as bringing all the facts before this court, as they stood before the Circuit Court. And this court, exercising a revisory jurisdiction, would be required to try the cause on its merits. *This is never done on a writ of error*, which issues according to the course of the common law. * * * * * * * If the case be revised on a writ of error, the evidence on both sides must be considered and weighed by the court, as a jury would consider and weigh it; and after adjusting the balance, the principles of law, not as they were presented to the Circuit Court, but as they may arise on the evidence, must be determined *This is not the province of a court of error*, but of a Court of Chancery on an appeal from the decree of an inferior court." *Minor* v. *Tillotson*, 2 *How.*, 393 *and* 394. *Jan. Term*, 1844.

"So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of evidence (1 Bac. Abr., 779; Bull N. P., 316). Beyond this we have no power to look into the bill, on a writ of error, as it is the creature of statute, and restricted to the point stated. 13 Edw. 1, C. 31. And only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel.

We have no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial, on a case made." *Teller's Lessee* v. *Eckert*, 4 *How.*, 298. Jan. Term, 1846.

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"In cases at law *this Court can only review the errors of the court below in matters of law appearing on the record.* * * * * * * * * So far as the record exhibits the facts, no error appears. The note being found to have been obtained from the defendant by fraud, the plaintiff's right to recover on it necessarily depended on the fact that he gave some consideration for it, or received it in the usual course of trade. We must presume that the court found this fact against the plaintiff; and if so, their judgment was undoubtedly correct. *Whether their 'inferences or conclusions of fact' were correctly drawn from the evidence is not for this Court to decide.*" *Prentice* v. *Zane*, 8 *Howard*, 485. Jan. Term, 1850.

"Every presumption is in favor of the verdict, and that it was supported by the evidence on the trial. * * * * If the evidence were not enough, the corrective was in the hands of the court, on a motion for a new trial. * * * * The court was asked, substantially, to charge the jury that the city was not responsible, because there was evidence which *tended* to prove the existence of certain facts. This the court had no right to do. The court could not tell the jury that any legal results followed from evidence which only tended to prove the issue to be tried. This controversy necessarily turned on the finding of the jury upon the evidence, and *an instruction which sought to withdraw from the jury the right to determine matters of fact was correctly refused.*" *City* v. *Babcock*, 3 *Wall*, 244. December Term, 1865.

And see Fishburn *v.* Chicago, Milwaukee & St. Paul R. W. Co. Decided Nov. 3, 1890.

"This Court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence." *Dirst* v. *Morris*, 14 *Wall.*, 490. *Dec. Term*, 1871.

Eleventh. The remaining exceptions and assignments of error, from number *sixteen* to number *sixty-three*,

both inclusive, relate to the charge of the court, either to what the judge did actually charge, or to what he refused to charge at the request of the plaintiff in error.

The court was requested by the defendant in error (page 303 of the printed case) to charge that "under the evidence the issue is: 'Was the disease which killed him alcoholism?'" And had said in reply to that request, "I decline to charge that, further than that you ought to gather from all of the testimony in the case, what was the cause of death." The plaintiff in error then excepted to the words "you ought to gather from all the testimony in the case what was the cause of death," and assigns error upon that exception, the assignment of error being number *sixteen*.

This, of course, relates to the death of William A. Davey, and so far as the fact of his death was involved in this controversy, it was, what was the *cause* of his death? Was it alcoholism? Was it caused by an excessive use of alcoholic stimulants? Or was it the result of lung disease, or cancer of the stomach, or sun-stroke, or some other cause? From what cause did it arise? This, then, being a question involved in the case, to be determined by the jury, how could they determine it? In what way had they a right to determine it other than as they could "gather from all of the testimony in the case what was the cause of his death."

Would it not be insulting the intelligence of the court to elaborate more fully the answer to this exception and assignment of error?

Twelfth. The court had been requested by the defendant in error (page 303) to charge that "this (meaning evidently the cause of the death of William A. Davey) is a question wholly for the jury upon the evidence in the case," and in answer to this request the court had said, "I charge that, with this addition; the question is wholly for the jury upon the evidence in the case under the instructions, as to the legal questions, given by the court." The plaintiff in error thereupon excepted to the request as charged; and especially to the words "this is a

question wholly for the jury upon the evidence in the case," and the *seventeenth* assignment of error is based on this exception.

What does this exception and assignment of error mean? That this was not a question for the jury at all? Or that if it was a question to be determined by them, that they could not determine it from the evidence in the case, but must determine it in some other way, and if so, how?

Thirteenth. The court had charged the jury (page 304) that it was incumbent upon the plaintiff in error to make out their defense to this suit, and that in doing so the burden of proof was upon them. But a special request was made by the defendant in error to charge that "the burden of proof is upon the defendant" (the plaintiff in error). To this request the court replied "I have so charged you, and so charge you now. That the burden of proof is upon the defendant; they must satisfy you that the defense has been made out." And thereupon an exception was taken by the plaintiff in error to the request as charged, and the *eighteenth* assignment of error is based on that exception, alleging as error the use of the following words: "The burden of proof is upon the defendant; they must satisfy you that the defense has been made out."

If the defendant was not to make out their defense, who should do it? Was the plaintiff bound to do it for them? And upon whom did the burden of proof, in attempting to establish this defense, rest?

The plaintiff on her part had laid the foundation of this action. The burden of proof in establishing the existence of this policy of insurance, and the payment of the premiums under it, and the death of the insured was upon her. When the defendants, therefore, set up and alleged a defense against the action, the burden of establishing that defense was upon them. Clearly not even the plaintiff in error will pretend that the burden of proof in establishing this defense was upon the defendant in error, and if it was not upon the defendant in error,

upon whom, pray, did it rest if not upon the defendant in error?

Fourteenth. The *nineteeth* assignment of error is substantially the same as the eighteenth, which we have just considered. And what has been said in regard to that assignment may here, with propriety, be repeated with regard to the nineteenth.

Fifteenth. The *twentieth* assignment of error is based upon the 8th request of the defendant in error. The court had been requested by the defendant in error to charge the jury that "If those opinions (of physicians) are founded on testimony giving what is called the history of the case, the jury must determine whether that history is true. Therefore, if the jury do not credit the story of William White and Andrew Duclone, whose relation is stated to have been given to Doctor Watson, the jury have the right to reject his diagnosis; and they have a right anyhow if they do not confide under all the evidence in his skill and experience in cases of this sort." The court in answer to this request had said the first part of that "I charge that these opinions are founded upon testimony giving what is called the history of the case, and you must determine whether that history is true. You must determine whether the facts upon which the hypothetical questions are based have been proved or not to your satisfaction. I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience under the evidence in this case, to reject his diagnosis." The plaintiff in error thereupon excepted to the words "I also charge you that you have the right, if you do not confide in Doctor Watson's skill and experience under the evidence in this case, to reject his diagnosis." Does the plaintiff in error mean to insist that the jury were bound to accept the conclusions of Doctor Watson, whatever may have been his skill or experience, or intelligence, or capacity as a physician? Is it not manifest that this exception is simply intended to take from the jury the right to form

their opinion upon the weight of the evidence in the cause? It seems to us so absurd, that it is like insulting the intelligence of the Court to waste words in answer to such an exception.

Sixteenth. The defendant in error (page 304) had requested the court, in her ninth request, to charge as follows: "9th. If the jury should believe that the effectual controlling cause of the death of William A. Davey was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, if they believe that it was taken in good faith for medical purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens," and the court so charged the jury. Thereupon the plaintiff in error excepted to that part of the charge, and bases the *twenty-first* assignment of error thereon.

All that we need say about this instruction given by the court to the jury is, that it is taken from the opinion of this court substantially, when this case was before the court on a former occasion. (See 123 United States Supreme Court, pages 743-4.)

The same may be said of the instructions given by the court to the jury according to the *tenth* request of the defendant in error, and which forms the basis of the *twenty-second* assignment of error.

Seventeenth. The *twenty-third* assignment of error is based upon the refusal of the court to charge the jury otherwise than already charged, as prayed for in the *second* request to charge, of the plaintiff in error. This *second* request was in these words: "The expression of the policy 'becomes so far intemperate as to impair his health or induce delirium tremens' does not mean habitual intemperance or the injurious addiction to alcoholic liquors." By looking at the charge of the court as it appears upon pages 296 and 297, it will appear that the court had al-

ready substantially charged as requested in almost the precise language stated by the plaintiff in error.

Eighteenth. The plaintiff in error had requested the court to charge (page 305) "if the jury believe that said Davey, after the delivery of the policy, had delirium tremens induced by intemperate use of alcoholic liquors, the policy is void except as therein provided." To this request the court responded, "I add to that, provided that said use was not under medical advice and for medical purposes only, and with that condition I charge that to be the law." The plaintiff in error thereupon excepted to this charge of the court for the reason that the court added "provided that said use was not under medical advice and for medical purposes only." This is the basis of the *twenty-fourth* assignment of error.

All we need say to this part of the charge of the court is, that it was taken from the opinion of this court in this case as it is reported in 123 United States Supreme Court Reports.

Precisely the same answer may be made to the *twenty-fifth* and *twenty-sixth* assignments of error. The instruction of the court was based entirely upon the opinion of this court as above referred to.

Nineteenth. The 11th, 12th, 13th, 14th and 15th requests to charge, upon which are based the *twenty-seventh, twenty-eighth, twenty-ninth, thirtieth and thirty-first* assignments of error, are fully covered and answered by the charge of the court as delivered to the jury.

"Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction, presented by the losing party and not given by the court, were correct in the abstract, as the refusal of the court to give the instructions as requested, under those circumstances, would not work any injury to the party making the request,

and therefore cannot be regarded as error." *The Schools* v. *Risley*, 10 *Wall.*, 115. Dec. Term, 1869.

Twentieth. The *thirty-second*, *thirty-third*, *thirty-fourth*, *thirty-fifth*, *thirty-sixth*, *thirty-seventh* and *thirty-eighth* assignments of error (pages 331-332) are based upon the exceptions taken to the 16th, 17th, 18th and 19th requests to charge made by the plaintiff in error (pages 307-308). They all relate to one subject, the effect of the certificate given by Dr. Rae, as to the *probable* cause of the impairment of health of William A. Davey.

The charge of the court upon this subject is very clear and very full, and appears upon page 299 of the printed case.

The court has given to the plaintiff in error all of the benefit possible to be derived from this certificate.

The judge had told the jury that this certificate was evidence to be considered by them with other evidence in the case, but that it was not conclusive evidence.

The effort of the plaintiff in error was plainly throughout to take the consideration of all questions from the jury and make the court decide the case for them. This the court declined to do, and their refusal is really the basis of all the exceptions and assignments of error grouped under this head and relating to this certificate of Dr. Rae.

Dr. Rae had certified that Mr. Davey was in the habit of using stimulants and *a great deal of tobacco*, and probably that impaired his health.

Now the plaintiff in error wished the court to tell the jury that this certificate was *prima facie* evidence that he, William A. Davey, was in the habit of using stimulants, and probably they impaired his health, leaving out tobacco entirely.

If the court had told the jury this, it would have been an absolute perversion and falsification of what Dr. Rae had certified.

But suppose that it was technically an error in the court, if such a supposition be possible, to tell the jury

that this certificate was not *prima facie* evidence that Mr. Davey's health was probably impaired by the use of stimulants, how could this prejudice the plaintiff in error?

The court had told the jury that the certificate was evidence, but it was not the whole evidence. There was other testimony, and this too must be considered. Even if the certificate was *prima facie* proof, it could be nothing more, and could not control the evidence. It must all be considered together. Could it be otherwise? Is it not therefore more than absurd to pretend that there was any error, damaging to the plaintiff in error, in this instruction to the jury or the refusal of the court to charge in this respect as requested.

We have thus as briefly as possible examined these sixty-six assignments of error, and from our stand-point we have failed absolutely to discover a single mistake in the rulings of the court upon any of these questions, and especially any one which could possibly injure or prejudice the case of the plaintiff in error. That party clearly has no right to complain of any decision of the able judge who tried this cause, or of any instruction given by him to the jury for their guidance.

JOHN LINN,
Counsel of Deft. in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1388.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

Plaintiff in Error

vs.

ADA WARD, WIFE OF CHARLES WARD (FORMERLY ADA DAVEY),

Defendant in Error.

BRIEF OF CORTLANDT PARKER FOR DEFENDANT IN ERROR.

THE SHARP PRINTING CO., 23 & 25 N. Warren St., Trenton, N. J.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1388.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Plaintiff in Error,
vs.
ADA WARD, wife of CHARLES WARD (formerly ADA DAVEY),
Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR DEFENDANT IN ERROR.

Sixty-six errors—fourteen of them in the conduct of the evidence, nineteen in what the judge charged the jury, twenty-nine in what he refused to charge, four in that the court left the case to the jury and did not direct the finding of a verdict for defendant—are assigned in this case.

And all this upon the trial of a claim on a policy of life insurance, where the defence set up was a breach of the clause that "if he shall become so far intemperate as to impair his health or induce *delirium tremens*" the policy shall be void.

The case has been tried three times. The death occurred August 6th, 1881. Its first trial was in January, 1884. It was brought to this court by writ of error, and because of a mistake in the charge of the judge, sent back for trial. The second trial occurred March, 1889, and the verdict was set aside in the following fall as contrary to the weight of evidence. The third trial happened, and that verdict is now before this court for review.

The zeal, diligence and persistency of counsel equals that of his clients. Could the court read the three hundred and thirty-one pages of the case they would be astonished at the method of examination pursued by counsel with his own witnesses, the obtaining testimony by leading questions, by reprimands, by compelling witnesses to read a printed volume purporting to contain testimony before given by them—even by threats of incarceration.

I. The oral testimony was of two sorts. *First.* The evidence of boatmen as to the use of alcoholic liquor. *Second.* Of experts, dependent, directly or indirectly, upon the truthfulness of these boatmen and other servants for their own diagnosis. The evidence of both these classes of testimony was opposed by counter-proof. Three physicians were sworn for each side. What we think was the fabricated testimony of boatmen as to the habits of the insured, was opposed by the oaths of his wife, his brother, his friends and acquaintances. The scenes of the dying bed of the insured were related differently by witnesses whose accounts could not both be true. The case went to the jury on the credibility of witnesses, and with a charge, we thought, too favorable to the defendants.

This is enough to say in answer to the XV., LIII., XXXIX., LXIV., LXV. and LXVI. assignments of error, which are, (XV.) that the court refused to direct a verdict for the defendant; (LXIV.) that it left the case to the jury instead of giving a direction to find for defendants; (LXV.) that the jury should have found a verdict for defendant and should have been so directed; (LXVI.) that the verdict was against the uncontradicted evidence in the case, and the court should have directed a verdict otherwise.

Iteration and reiteration can hardly lead this court to think a judge erred in leaving to the jury a case of contradictory proof, and which depended especially upon the credibility of witnesses.

The case of Fishbourn *v.* Chicago, &c., R. R., 137 U. S. —, following many earlier cases in accordance with it, to be hereafter cited, settles that this court will not trouble itself with questions of fact, nor will it reverse a judgment because an inferior court left them to a jury.

II. Was there any material error, either in the admission or rejection of testimony?

Exception 1.—It was material to show that proofs of death were delivered; that was required by the policy, and fixed the time of liability. The plaintiff showed that she called on the president of the company, at its office in Hartford, and was asked what he said in reference to having received notice and proofs of death and their intention to pay or not. The answer was, that he had, and was not satisfied, and did not intend to pay the policy, thus absolving the plaintiff from further proofs.

The declaration of a chief officer, in the office of his corporation, is surely admissible.

Page 14, line 23, the defendants admitted the delivery of the proofs and its date. So, if there was technical error, it was cured.

Exception 2.—"Do physicians prescribe alcohol to be taken sometimes in quite considerable quantities?" is a harmless question asked of a medical witness (page 21) on cross-examination, after he had said that the decedent said he had been drinking freely.

No exception to that question ought to have been sealed.

Exception 3.—Medical witnesses give their diagnosis upon what they learned of the patient's history. Dr. Watson's testimony was based on this. But when Dr. Rae said, "I was told that he had been exposed to the sun," it is hearsay, and must be overruled; and that not being done, another exception. Page 224.

Exception 4.—Dr. Rae had given a certificate stating that the indirect cause of his death was exposure to the sun and cirrhosis of the liver. When asked to say why he did it, objection, &c. Exception again. Page 224.

Exception 5.—The witness' attention is called to evidence before given, on the question of the other side. It is quoted to him. "Gov. Bedle," so it says, asked him whether he did not give his certificate *after seeking to inform himself.* He is then asked, "From whom did you receive the information?" Page 229. The object was to show its unreliability. But again comes an exception.

Exception 6.—A. C. Mattoon was called for the plaintiff, and asked the unimportant question, "In what business were you engaged, if anything?" He goes into a catalogue of employments, among them, "I have also a large commercial greenhouse that I own, and conducting it through employes." Nothing could be less important. But, to impeach him, the defence seeks to show that he does not own this greenhouse, and having proved by him (page 256) that he had owned it thirty years, they produce an examination on supplementary proceedings, and ask, "Did you testify this way on this examination: 'I have no real estate that I know of?'"

To impeach a witness by leading him to say that he had owned property a long time, and then trying to show that he had once said otherwise, seemed to the court inadmissible. It was going into matter entirely extraneous. They were bound by his answer that his ownership had been for a long time. They could not prove against him that he had stated an untruth on some point not involved in the matter on trial.

Exceptions 7–9.—Mrs. Davey is asked (page 264) if her husband took stimulants; did she give them to him. She said, "Yes; frequently." Then came the questions, "Did he take them under medical advice? Did he or not take them for medical purposes?" It was a defence that this was so—in conformity with the opinion of this court, and the direction of the judge.

It is not within our power to say why these questions were unlawful.

So, as to Exceptions 10, 11, 12—

Mrs. Davey (or Ward) swore that she visited Dr. Kellerman, a New York specialist, deceased at the time of the trial, with her husband, and that in her presence the doctor prescribed to him stimulants, to be taken *till he felt their effects*, to take them in *milk and with water through the day*.

Counsel insisted that it was hearsay. If so, the fact of a prescription to a dead patient could never be proved except by the physician himself, though made in a public meeting. The objection was frivolous.

Exception 13.—A long hypothetical question (page 278) is put to a medical witness. He assents (page 279) to certain language of counsel as an answer to it, viz., "The symptoms which this man exhibited were such that a physician without an autopsy could not tell from what he died."

The exception seems to us frivolous. The same answer, in substance, was given by all three of the physicians called by plaintiff; so, anyhow, the matter is unimportant.

Exception 14.—Exception to the hypothetical question. If it was insufficient, incorrect or inapplicable, it was harmless. Anyhow it was lawful. See page 286.

We come, now, to the charge of the court, and the questions raised upon that.

The case of the plaintiff was proved. The questions in the cause arose upon the defence, which was made under the fourth plea (page 8), which averred that the insured, after the issuing of the policy, *became so far intemperate as greatly to impair his health and to induce delirium tremens*, contrary to the form and effect of the conditions, upon which the policy should be void.

This averment is in the language of the condition itself, except that the word "and" was used instead of "or."

Clearly, the truth of this plea lay upon the defendants. The burden of proof lay upon them. No serious question arose upon the meaning of the contract.

It was an issue for the jury. Had the deceased become so far intemperate as greatly to impair his health? Had the deceased become so far intemperate as to induce *delirium tremens?*

The first question was peculiarly one for a jury. Was the man intemperate? So as to impair his health? So as *greatly* to do so? The second question was almost, if not quite, equally for a jury. Did his intemperance induce *delirium tremens?*

As the cause was conducted, the last was the chief question. It was contended that a debauch, at Alexandria Bay upon the St. Lawrence, induced *delirium tremens*, through which he died. Of course, if this was true, intemperance greatly impaired his health; so both branches of the condition were involved on his having had *delirium tremens.* And the defendants put themselves before the jury that this attack of *delirium tremens* was the cause of his death.

The charge of the judge declared that the burden of proof was upon the party who set up the defence. This is one principal alleged error.

In every other respect, the charge was in accordance with the views of the defendants as to the meaning of the contract and the weight of the evidence, except that his Honor adopted the opinion of this court as declared by Mr. Justice Harlan, when he said (— U. S. Rep., p. —), "If the substantial cause of the death of the insured was the excessive use of alcoholic stimulants *not taken in good faith for medical purposes or under medical advice, his health* was impaired by intemperance within the meaning of the words," &c., and so charged the jury.

On the part of the plaintiff, it was alleged, that if there had been excessive use of alcoholic stimulants, which was denied, it was through their having been taken in good faith for medical purposes or under medical advice; and the evidence of his wife proved this.

We are now prepared to examine *seriatim* the errors assigned upon the judge's charge.

In Assignments XVIII., XIX., XXXVIII.–LX., the objection is, that the court said that the burden of proof lay upon the defendants, and that the weight of evidence must decidedly preponderate on their side.

Argument to support the charge seems scarcely necessary.

The charge was eminently careful and judicious. See page 301. "All this must be taken into consideration by you, gentlemen. * * * Does the testimony satisfy you, taking it altogether, that Mr. Davey became so intemperate in the use of alcoholic spirits as to impair health, and did he, at Alexandria Bay, in 1881, indulge in the use of alcoholic liquor to such an extent as to induce *delirium tremens?* If so, the defendant is plainly entitled to your verdict. If, on the other hand, the testimony does not so satisfy you, or if you are convinced that all the liquor which he used was used in good faith under medical advice and for medical purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff.

"In weighing this testimony, I desire you to be guided by two principles which control in this case, and the first is this: That the burden of proof is upon the defendants in this case; that is, the obligation is upon them to prove the facts relied upon by them as a defence. The plaintiff is not called upon to prove that these facts did not exist, but the defendants are to prove that these facts did exist. It is their duty to present to you evidence which is to satisfy your mind. Such evidence need not be so convincing as to make the effect beyond reasonable doubt, but the weight of the testimony must decidedly preponderate on the side of the defendant."

In Assignments XVI., XVII., XXII., XL., XLIII., XLVIII., LVI., the objection is, that the court told the jury they ought to take all the testimony into consideration and gather therefrom the cause of death, under the instructions as to the legal questions given by the court, and that the facts were for them to determine.

The trial judge in one sentence (page 333) gives the answer to all these exceptions when asked, in the twentieth request of the plaintiff in error, to charge that "as a matter of law, upon the undisputed facts in the case, there can be no recovery for the full

amount of the policy," he replied, "If I am to charge that, what use would there be for the jury? The court is not here to determine the facts, but simply to lay down the law. The facts are for you to weigh and determine."

Stress is laid upon the use by the judge of the word "~~disorderly.~~" He used it in a popular sense, not emphasizing it. So the whole context shows. He meant, and must have been understood, the weight of the testimony must preponderate to the degree that induces you fairly to decide for the defendant.

In the following assignments the objection is, that the jury had no right to determine whether the testimony giving a history of the case upon which the opinions of the physicians were founded was true, whether the facts upon which the hypothetical questions were based had been proved or not to their satisfaction, and that it was error to say that if, under the evidence, they did not confide in Dr. Watson's skill and experience, they had the right to reject his diagnosis, viz., XX., XLV., XLVI., XLVII., XLIX., LII.

In other words, the defendant contends that if the medical witnesses based their opinions upon false statements of the case, these opinions must still prevail. The defendant likewise contends that the jury were not judges of the credibility of witnesses, nor of the reliance that ought to be placed on their testimony.

In the following assignments the objection is, that the court told the jury that if they believed that the cause of decedent's death was the excessive and continuous use of strong drink, yet, if they believed that it was taken in good faith for medical purposes under medical advice, such use did not violate the condition of the policy: Assignments XXI., XXII., XXIV., XXV., XXVI., LXI., LXII.

In charging as it did upon this topic (see pages 301, 302) the court followed the views of Mr. Justice Harlan with scrupulous exactness.

The question before this court was the correctness of Mr. Justice McKennan's charge on the first trial of this case at the Circuit, that on a correct construction of the condition "a single excessive indulgence in alcoholic liquors was not intemperance, but there must be such a frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence."

Mr. Justice Harlan said: "This construction of the contract was, in the judgment of this court, erroneous. If the substantial cause of the death of the insured was the excessive use of alcoholic stimulants *not taken in good faith for medical purposes or under medical advice*, his health was impaired by intemperance within the meaning of the words 'so far intemperate as to impair health,' although he may not have had *delirium tremens*, and although previous to his last illness he had not indulged in strong drinks for such a long period of time or so frequently as to become habitually intemperate."

Mr. Justice Green's charge adopted the words of this court, and it is to this that the defendants take exception.

The defendants' counsel asked for several charges, which were actually made in other language, and excepted because the judge preferred his own words to those suggested.

One of these exceptions is 23. Others are 29, 30, 31.

Twenty-four is an exception where the court complied with the request to charge *verbatim*, adding thereto the restriction as to use under medical advice. Counsel except to both the charge and the addition of the modification.

Twenty-five is a case of the same kind. So is 26. Twenty-seven calls for a charge which would have taken from the jury the right to interpret the condition "so far intemperate as to impair his health."

Twenty-eight is like the last, except that the words "in any degree" were stricken out, no such idea being contained in the covenant, nor could it have been intended; beside that, the plea says *greatly* impaired.

Assignments XXXII., XXXIII., XXXIV., XXXV., XXXVI., XXXVII., L., LIX., have reference to the legal effect of Dr. Rae's certificate, to be found on page 325 of the case.

By the policy (page 313) the company agrees to pay the amount of insurance, $10,000, within ninety days after due notice and proof of the death of the insured. This language is repeated in clause eighth. Page 315.

Due notice of the death, and proof of the death, are all the policy requires.

But the company, without any legal right, asked fuller proofs, and had blanks, which, after the death, it gave to a witness who acted as the friend of Mrs. Davey. One blank called for an affidavit of identity; a second, for an undertaker's oath of burial; a third, for the minister's affidavit who officiated; a fourth, for proof of his age; a fifth, for an affidavit of the plaintiff's right, of her age, and that she was the decedent's lawful wife; a seventh, of the movements of the insured during the policy; a ninth calls for a physician's certificate of death, and of its cause.

So far as regards the fact of death, one might admit the propriety, for very abundant caution, of requiring the fact of death proved by the wife, the undertaker, and the clergyman officiating at the man's burial to be corroborated by the physician, though ofttimes people die without the aid of the faculty. But what right had this company to ask for the attending physician's certificate of the cause of death? Not a word in the policy justifies it.

Well, in this case, Dr. Rae, who was with the man shortly before he died, not at the time, gave a certificate upon one of these inquisitorial blanks, a blank evidently intended to make recovery of the money more difficult. It is in the form of questions:

1. How long have you known the deceased?
2. What was the direct cause of death?
3. What were the indirect causes of death?
4. Was his last illness occasioned or had his general health been impaired by *any pernicious habit?*

Dr. Rae stated that the direct cause of death was exhaustion from hœmatamesis—the indirect exposure to the sun and cirrhosis of the liver; and to the last above question he replied, "He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health."

Now, here was an opinion, handed in, it is true, by a friend of the plaintiff, but upon an unauthorized exaction of the defendants, having little to do with the matter. Dr. Rae is called as a witness. And it is gravely urged that this voluntary affidavit of his must be regarded as *prima facie* evidence of the truth of the statement he made. The court said: "No. It is not *prima facie* evidence. It must be taken into consideration with the other evidence, and I have told you what weight to give it."

Was it evidence at all? Mrs. Davey swore she never saw it, or heard it, or heard of it. The company asked for it, got it, and, as it went in with the proof of death, we had to produce it on the trial. We objected, but were overruled. It was an opinion, stated by a competent witness. It was no more evidence than if Dr. Rae had gone to the company and made the same statement orally to them.

The court said (page 299): "Now, gentlemen, as a matter of law, I charge you that this certificate is not to be taken or accepted by you as conclusive evidence of the truth of the facts therein stated, nor is the plaintiff bound by this statement, or estopped from proving to your satisfaction a different cause of death. It is entitled to the weight which you would give an opinion of a learned physician as to the cause of his death, who saw the person spoken of shortly before his death, and who had personal knowledge of the person for some time previous to his death. Especially must that weight be given to this statement when, as in this case, the person who made the certificate, Dr. Rae, testifies before you that he adheres now to the opinion he expressed in that paper."

It is submitted that there was no error here—at least that the defendants have no right to complain. The plaintiff had. The certificate was proof of nothing. It did not proceed from the plaintiff; nor was she chargeable with its contents.

Exceptions 41, 42, 43, 44, are answered on page 308 by the learned judge below.

Exception 51 is because counsel preferred their own language to that of the court. See the case, page 296.

Exceptions 54, 55, see the language of the court in refusing, at page 311.

Exceptions 57, 58, destroy themselves on perusal of the charge.

As to exception 63, the charge defends itself. See page 336, where it is recited.

On the whole case, it is abundantly clear that everything was done for the defendant by the learned judge below that could be lawfully asked. He could not lawfully take it from the jury, or direct them what their verdict should be. There was a contrariety of proof. On the one side an ignorant country physician, who cannot positively say that he ever in his life had before seen a case of *mania a potu*, or cirrhosis of the liver, to know them, witnesses symptoms entirely reconcilable with something else, to wit, with sunstroke, epilepsy, and bleeding caused by the poor man's biting his tongue when in a fit, or by cancer or ulcer of the stomach. He makes no special examination. He does not seem to have even felt his pulse. He did not know his temperature, or the action of his lungs. He did not examine the blood which had come from him. He gave it a glance, apparently, and but a glance. He says himself "an ulcer of the stomach might produce it, and a cancer might produce it." The man himself told him several things, that he had had a bilious attack, had taken pills that night, and also that he had been drinking freely (he did not say that night), and had had trouble with his liver, which his physician called cirrhosis. He gave an opinion which he formed from his nervous condition, and from what others told him he had been doing. And he named three persons, a clerk at the hotel named Bruce, now become a doctor, and two oarsmen whom he named. Bruce knew nothing of his drinking. The two oarsmen were dis-

credited. Dr. Watson, the first physician called in, said of himself, substantially, that he was not an expert. Bruce, when he saw the man, was a medical student in an early stage, who got his living as bookkeeper at a hotel.

Two medical gentlemen from New Jersey were called, who gave their opinion on the strength of Dr. Watson's and Dr. Bruce's; *whose* opinion, as seen, stood upon the story of the oarsmen and attendants. They thought the man had *delirium tremens.*

But these oarsmen were utterly unreliable, and upon this the jury had every right to pass. The method of their examination was, professionally considered, an outrage. They, substantially, recited a catechism. No jury ought to believe them, and no jury would. Their statement of the man's intemperance was incredible. They described a man utterly different from the man who was known by his friends and acquaintances.

Their evidence was contradicted by all the respectable testimony in the cause. The deathbed they described was different from what his wife and a lady friend saw and related. They described delirium, sleeplessness and delusions. The wife and her friend entire absence of delirium, physical rest, sleep, appetite, and rational communications and behavior. His life at Alexandria was described by several witnesses, and shown to be, in fact, irreconcilable with their account. Every respectable witness from the locality either contradicted them, or, with every opportunity of seeing and knowing, knew nothing of this extreme intemperance which they imputed. And every one of them came to the witness-stand either with the promise or the actual receipt of sums of money, certainly large to them, for the giving of their testimony.

Strike out their evidence, or discredit them, and the plea was not proved. The burden lay upon the defendants. A *post-mortem* would have made the thing clear. The company had immediate notice of the death. They might have had an examination of the remains.

And two physicians of eminence stated conclusions on the subject, opposed to those of the experts called for the defendants.

It was, beyond question, a matter for the jury.

Three juries have found the same way. Two undoubtedly have. In all three trials the defence depended mostly upon the same witnesses. In this last, important testimony was given for the defendant in error not given before. The expert evidence above named was first given then. The rule of practice is, almost without exception, to grant a new trial but once. If one is awarded now, it will be the fourth trial that will occur.

The opinion of the court when this case was formerly before them is very pertinent now. See 123 U. S. 743, 744.

"The jury may have believed—and there was some, *we do not say conclusive, evidence,* to justify them in so believing—that the efficient controlling cause of the death of the insured was an excessive and continuous use of strong drink for several days and nights immediately preceding his death. * * * If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance within the meaning of the words 'so far intemperate as to impair his health,' although he may not have had *delirium tremens,* and although previously to his last illness he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. *Whether death was so caused is a matter to be determined by the jury under all the evidence.*"

And the court ended with the decision that "the judgment must be reversed," with directions for another trial in accordance with the principles of the opinion.

No one can read the charge of the learned judge at the last trial without perceiving that his aim was exactly to carry out this direction, and that he did so.

Some of the very language of this court's opinion, such as "whether death was so caused is a matter to be determined by the jury under all the evidence," and, "if the substantial cause of the death of the insured was an excessive use of alcoholic stimulants not taken in good faith for medical purposes or under medical advice," will be recognized as being the subject of exceptions by the learned counsel.

The case of the *N. W. Ins. Co.* v. *Comstock*, 122 U. S. 502, quoted by Mr. Justice Harlan in his opinion, seems very instructive as to this present matter.

The court there held the same doctrine as that of Judge Green in regard to the burden of proof; in regard to the use of language equivalent to that suggested by requests; in regard to the value of what counsel here call only negative testimony; in regard of the impropriety of taking the determination of the cause from the jury; in regard of the province of the jury, and their duty to weigh all circumstances and to determine in view of them all.

To two passages we call attention.

See page 505: "The plaintiff was not bound to prove that the assured was temperate, but the defendant was bound to prove, not only that he was intemperate at those periods, but that he was habitually so. This it was bound to do by such a preponderance of testimony as should satisfy the jury. * * * The main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them."

And on page 513, this court said, referring to requests very similar to those here, one of them a direction to the jury to find for the defendant: "The questions presented by these requests do not rise to the dignity even of mixed law and facts, but are questions the answers to which are governed by no settled principle or rule of law established either by statute or by a recognized course of judicial decision. They are emphatically questions of fact which it is the province of a jury to decide, and in regard to which they are, or ought to be, as capable of making a decision as the court or any one else."

It is not necessary in this argument to satisfy this court that the verdict rendered was right. All incumbent on the defendant in error is to show that there was contradictory evidence, or otherwise a case for the jury.

Surely, three verdicts might be thought to show that the case of the defendant in error was one of merit.

A word or two more may be excused, though at the risk of repetition. The case for the plaintiff in error stood clearly on the opinions of physicians.

Only two medical men saw the insured in his last illness, Dr. Watson, the Alexandria Bay doctor, and, afterwards, Dr. Rae, of Jersey City.

True, a Dr. Bruce is also spoken of. But he was then no doctor—only a bookkeeper at the hotel.

Dr. Watson says (page 24) that he formed his opinion from what he saw of his condition, and "from what others told him he had been doing. I talked to Dr. Bruce, as he is now, and, I think, to the attendants Andrew Duelone and William White, his oarsmen."

Dr. Bruce swears that he never saw him drink liquor. Page 40.

Dr. Watson first saw him on Wednesday as he died on Saturday. Thursday night or Friday morning Dr. Rae came and took charge of the case.

As already said, Dr. Watson made no special examination—no diagnosis. He thought it was a case of *delirium tremens*, but he had no confidence in himself; he said, "I am competent may be to express opinion upon some medical subjects, but I don't want to make myself an expert." Page 16. Asked about cirrhosis of the liver, he said, "I presume I may have seen cases of cirrhosis of the liver. Did you know it at that time? I hardly think I did at the time."

He said that Davey said he had been drinking (not, however, the night before, as counsel insist, page 16), and that his physicians had warned him about it.

Whether Davey's declarations can affect his wife's rights, is perhaps a question, but, if he was the subject of *delirium tremens*, his statement is of but little consequence.

So, Dr. Watson's opinion stood on the statements of White and Duelone.

Dr. Rae made no diagnosis. His opinion was founded on Dr. Watson's. Pages 223, 224, 225. He made the direct cause of death exhaustion from bleeding—the indirect exposure to the sun and cirrhosis of the liver.

But that, he says, is not a certainty. An autopsy could settle it—nothing else.

Dr. Phillips and Dr. Ward never saw the man. They answer hypothetically on Dr. Watson's statement.

The evidence was taken of two physicians, called for Mrs. Davey, Dr. Hunt and Dr. Katzenbach, never sworn in any former cause. Both say that Dr. Watson described symptoms which might have been epilepsy and its effects, or a uræmic convulsion—the bleeding might have resulted from a congestion of the stomach, erosion of the stomach, ulcer of the stomach, cancer of the stomach. Dr. Watson's statement, Dr. Hunt says, did not present at all a case of *delirium tremens;* there is no evidence, so far as he had heard, that would point to the disease known as *delirium tremens.*

Dr. Katzenbach (page 287) said, answering a hypothetical question, that he could not positively pronounce the case described one of alcoholism or *delirium tremens.* And he described such a patient with the fancied sight of vermin, or lice, or dogs, or snakes, or spirits. Nothing of this occurred in the case of Davey.

The evidence of these two physicians strongly antagonized the evidence of the experts called by the defendants. Attention is especially called to pages 291, 292, where a series of interrogatories ended in the answer, "There is nothing pointing toward *delirium tremens.*

This conflict is enough to send the case to the jury.

But, it is seen, that Dr. Watson founds his opinion on the statements of two witnesses, White and Duelone. What they said to him does not appear.

The contest turned, however, upon the credibility of these witnesses.

White's story was so exaggerated as to be entirely incredible.

He said the man drank some two or three quarts of brandy daily for the ten days he rowed him.

He made out that this had been always the way at his visits to the St. Lawrence.

He said he drank after Dr. Watson came, and that he was constantly under the influence of liquor.

Duelone, examined through extraordinarily leading questions, and constantly brought to the book of evidence before taken, told a story not quite as bad.

These men were both largely contradicted as well as discredited by their own stories.

He was not before the jury. His evidence was taken by commission. His story was so extravagant that it did not need to call witnesses to impeach him, nor could the defendant in error afford to bring witnesses for that purpose.

The extravagance of his story—the absence from the witness-stand of any person of standing and respectability residing at Alexandria Bay, or who had ever visited there and known Davey—beside the contradictions made by the testimony of Mrs. Davey, her lady friend, Mr. A. C. Mattoon, and others, justified in arguing before the jury that this testimony was not to be believed.

Mr. Crossman, keeper of the hotel, its chief waiter, Mr. Bruce, afterwards Dr. Bruce, none of them ever saw Mr. Davey in liquor.

And these two witnesses and their ignoble fellows, all boatmen, bell-boys or the like, the same sort of persons, attendants for jobs at a watering-place, were contradicted by respectable people. *They* described a miserable, drunken wretch, while a number of people from Jersey City described a steady, good citizen, a man of temperance and sobriety.

It is noticeable that not one man living in Jersey City, the place of his residence for many years, came to say that Davey was any such person as these Canadians and bordermen describe.

Read first the evidence of one set of witnesses, and then of the other. "They are directly in conflict."

Therefore it was no case to go elsewhere than to the jury.

In relation to the duty of courts in respect of the weight of testimony, reference is made to the following cases:

Chesapeake and Ohio Canal Co. *v.* Knapp, 9 Peters 541.

Van Ness *v.* Pacard, 2 Peters 137.

That the judge is not *bound* in any case to give his opinion to the jury on a question of fact or as to the weight or sufficiency of evidence:

Smith *v.* Carrington, 4 Cranch 70 (per Marshall, C. J.)
United States *v.* Burnham, 1 Mason 69.

There is a great distinction between setting aside a verdict rendered upon a direction, and refusing to direct. In the first case, the court will not do it if on the case the verdict was clearly right. In the other case, non-direction is not error. It is not the duty of the court to take the case from the jury, the appropriate tribunal for all questions of fact, especially when dependent upon the credibility of witnesses.

See 3 Graham on New Trials, p. 738.

The author declares, after reviewing cases, that if the charge of the court be a positive direction to find, a new trial will be granted. Greaves Maryland Ins. Co. v. Reeders 6 Cranch 338 per C. J. Marshall. Gardner v. Babcock 3 Wall. 240 - Schuchardt v. Alden 1 Wall - 350 - U. S. v. Tillston 12 Wheat - 180 q. note

Three trials of this case have occurred with like result. Two are ordinarily conclusive. "The court will seldom or never grant a third trial, in matters where law and facts are in a great measure blended together."

Moore *v.* Cherry, 1 Bay 269.
3 Graham on New Trials 1367.
Barret *v.* Rogers, 7 Mass. 297.
Foster *v.* Steele, 3 Bing. (N. C.) 892.
Bennett *v.* Runyon, 4 Dana 422.
Swinnerton *v.* Stafford, 3 Taunt. 232.
Bryant *v.* Ins. Co., 13 Pick. 543.

This established practice bears upon the case in hand because the allegation of error in not directing a verdict for defendant is but another form of laying a foundation for a new trial because the verdict is against the weight of evidence.

It is submitted that the judgment below should be affirmed.

CORTLANDT PARKER.

Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

JERSEY CITY PRINTING COMPANY'S "RAPID" PRINT, 37 MONTGOMERY ST., J. C.

United States Supreme Court.

THE ETNA LIFE INSURANCE CO., OF HARTFORD,
Plff. in Error,
vs.
ADA WARD (Formerly Ada Davy),
Deft. in Error.

Motion to Advance upon the Calendar.

No. 1,388.

JOHN LINN,
Attorney of Defendant in Error.

United States Supreme Court.

THE ETNA LIFE INSURANCE COMPANY OF HARTFORD, Plff. in Error, vs. ADA WARD (formerly Ada Davy), Deft. in Error.	Motion to Advance upon the Calendar. No. 1,388.

Motion is hereby made to the Court to advance this cause upon the Calendar according to the provisions of Rule 26.

The application is made on behalf of the defendant in error, and notice has been given to the plaintiff in error, as appears by acknowledgment and proof of service now on file with the Clerk of this Court.

This case was once before in this Court and decided upon the merits, and is reported in 123 U. S., 739.

The suit was originally commenced in December, 1881, and by reason of delays interposed by the defendant, or for which it was responsible, was not brought to trial until January, 1884. This resulted in a verdict and judgment for the plaintiff. This judgment was removed by writ of error into this Court, and was argued here in November, 1887.

The judgment having been then reversed and the record remitted for a new trial, the case was again brought to trial in March, 1889, and resulted as before in a verdict for the plaintiff. This verdict was set aside by the Court as wrong upon the weight of evidence, and a new trial awarded.

It was again brought to trial in March, 1890, and this time resulted, as it previously had, in a verdict and judgment in favor of the plaintiff.

This judgment is now brought to this Court by writ of error, and stands No. 1,388 upon the Calendar of the present term of the Court.

The case having once before been adjudicated by this Court upon the merits, and again brought up by writ of error, we respectfully ask that it may be advanced, according to the practice of the Court as provided in the Rule aforesaid.

The reasons for this application are patent upon a simple statement of the case.

They are the length of time occupied in the litigation, and that the case may be finally disposed of, if possible, in the lifetime of the defendant in error. Some of her most important witnesses have already departed this life, some are aged and infirm, and if the case is continued much longer they may all pass away.

JOHN LINN,
Counsel of Deft. in Error.

140-91
140-91

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

Ex Parte: In the Matter of THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS, &c.

And now in this Court, by its counsel, comes the Washington and Georgetown Railroad Company, of the District of Columbia, and respectfully asks leave of the Court to file a petition, herewith exhibited, for a writ of mandamus to the Honorable Edward F. Bingham, chief justice, and the Honorable Alexander B. Hagner, the Honorable Walter S. Cox, the Honorable Charles P. James, the Honorable Martin V. Montgomery, and the Honorable Andrew C. Bradley, justices of said court, and prays the court to direct that this cause be docketed, and that a rule be issued to the said justices to show cause, if any they have, on a day to be designated, why a writ of mandamus shall not issue as prayed for by said petitioner.

ENOCH TOTTEN,
W. D. DAVIDGE,
Counsel for Petitioner.

Endorsed: Supreme Court U. S. October term, 1890. *Ex parte:* In the matter of the Washington and Georgetown Railroad Company, petitioner. Motion for leave to file peti-

tion for mandamus, &c. Enoch Totten and W. D. Davidge, attorneys for petitioner.

Stamped: Supreme Court U. S. Received June 23, 1890. Clerk's office.

In the Supreme Court of the United States.

Ex Parte THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

To the Chief Justice and associate justices of the Supreme Court of the United States:

The petition of the Washington and Georgetown Railroad Company respectfully shows to this honorable Court as follows:

It is a corporation duly organized under and by virtue of an act of Congress of the United States and doing business as a common carrier, transporting passengers as a street railroad in the city of Washington, in the District of Columbia.

On the 16th day of January, 1884, one Lewis H. McDade, theretofore being an employé of the petitioner, instituted an action at law against the petitioner in the supreme court of the District of Columbia by filing therein a declaration, according to the practice in the said court, wherein the said McDade claimed damages to the amount of $20,000 from the defendant in that cause, because of certain personal injuries alleged to have been inflicted upon him, the said McDade, through and in consequence of the negligence and unskillfulness of the employés and servants of the petitioner and in consequence of the unfitness and bad condition of the machinery used in certain shops owned and operated by the petitioner wherein the said McDade was employed at the time of the injuries complained of. This petitioner pleaded to the said declaration, and issues in the cause were

"Proceedings before the supreme court, sitting in general term, commencing on the fourth Monday, 26th April, 1886

* * * * * * *

"MONDAY, *June* 28, 1886.

"Session resumed pursuant to adjournment.

"Present: Justices Hagner, James, and Merrick.

"LEWIS H. McDADE, Plaintiff, *vs.* THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, Defendant.	At Law. No. 25023.

"This cause having been argued by counsel on both sides and submitted to the court here upon the record of the special term and duly considered by the court; whereupon, because it seems to the court here that there is no error in the record and proceedings or in the judgment of the special term, therefore it is considered that the judgment be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that the plaintiff have execution thereof."

After the said judgment had been so affirmed by the general term of the said supreme court of the District of Columbia, the petitioner sued out a writ of error by which the said judgment and the proceedings were brought into this court for review. A supersedeas bond was duly presented, approved, and filed in said court, and a citation in due form was signed in the said cause and duly served. The said cause was thereupon docketed in this court; and afterwards and on the second day of December, 1889, the same being cause No. 137 on the docket of this court for the October term, 1889, was called for argument and was argued by counsel and submitted to the court.

Afterwards and on the 19th day of May, 1890, this court decided the said cause and in all things affirmed the said judgment of the supreme court of the District of Columbia; all of which by reference to the record of the said cause

tion for mandamus, &c. Enoch Totten and W. D. Davidge, attorneys for petitioner.

Stamped: Supreme Court U. S. Received June 23, 1890. Clerk's office.

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made up; and thereafter the said cause came on regularly for trial in the special term of the said supreme court of the District of Columbia, with a jury, which trial resulted, on the 18th day of December, 1885, in a verdict for the sum of $6,195; upon which verdict, on the same day, a judgment was rendered and entered of record in said cause in favor of the said McDade and against the petitioner. The said judgment of the said special term is in the words and figures following, to wit:

"FRIDAY, *December 18th, A. D.* 1885.

"Session resumed pursuant to adjournment.

"Cox, justice, present.

"LEWIS H. MCDADE, Pl't'ff, *vs.* WASHINGTON & GEORGETOWN R. R. Co., Def't. } At Law. No. 25023. Cal. 347.

"Now again come here the parties aforesaid and the same jury that was respited yesterday, who, after the case was given them in charge, on their oath say they find said issue in favor of the plaintiff and assess his damages by reason of the premises at six thousand one hundred and ninety-five dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant six thousand one hundred and ninety-five dollars for his damages, in manner and form as aforesaid assessed, and $—— for his costs of suit, and have execution thereof."

Afterwards a motion was filed in said cause in behalf of the petitioner for a new trial on a bill of exceptions, and the said cause came on to be heard on the said motion and bill of exceptions in the general term of the said supreme court of the District of Columbia and was argued by counsel; and afterwards, on the 26th day of April, 1886, the said supreme court in general term affirmed the said judgment of the said special term, with costs. The said judgment of the general term is in the words and figures following, to wit:

"Proceedings before the supreme court, sitting in general term, commencing on the fourth Monday, 26th April, 1886

* * * * * * *

"MONDAY, *June* 28, 1886.

"Session resumed pursuant to adjournment.

"Present: Justices Hagner, James, and Merrick.

"LEWIS H. McDADE, Plaintiff,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 25023.

"This cause having been argued by counsel on both sides and submitted to the court here upon the record of the special term and duly considered by the court; whereupon, because it seems to the court here that there is no error in the record and proceedings or in the judgment of the special term, therefore it is considered that the judgment be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that the plaintiff have execution thereof."

After the said judgment had been so affirmed by the general term of the said supreme court of the District of Columbia, the petitioner sued out a writ of error by which the said judgment and the proceedings were brought into this court for review. A supersedeas bond was duly presented, approved, and filed in said court, and a citation in due form was signed in the said cause and duly served. The said cause was thereupon docketed in this court; and afterwards and on the second day of December, 1889, the same being cause No. 137 on the docket of this court for the October term, 1889, was called for argument and was argued by counsel and submitted to the court.

Afterwards and on the 19th day of May, 1890, this court decided the said cause and in all things affirmed the said judgment of the supreme court of the District of Columbia; all of which by reference to the record of the said cause

No. 137, October term, 1889, in this court, will more fully and at large appear.

Afterwards and on or about the 27th day of May, 1890, a mandate dated on that day was issued in due form of law out of this court, directed to the judges of the supreme court of the district of Columbia. A true copy of the said mandate is hereto annexed and referred to as a part of this petition.

Afterwards and on or about the — day of May, 1890, the said mandate was presented to the said supreme court of the District of Columbia, holding a general term, in behalf of the said McDade, and a verbal motion was thereupon made in said court to enter up judgment against the petitioner for interest on the said judgment, at the rate of six per centum per annum thereon, from the date of the entry of the said judgment, to wit, from the said 18th day of December, 1885. At or about the same time the said mandate in the said cause was presented to the said court in general term the mandate issued by this court in the case of the District of Columbia *vs.* Woodbury, being cause No. 234 on the docket of this court for the October term, 1889, was also presented to the said supreme court of the District of Columbia, holding a general term, and a like motion in that case was made. The said two motions were thereupon argued by counsel and were by the court considered together.

Afterwards and on the 9th day of June, 1890, the court decided the said motions in favor of the respective plaintiffs in said court.

Thereupon, and on the said 9th day of June, 1890, the said court entered up a judgment against this petitioner for the payment of the said judgment so affirmed by this court, together with interest on the said judgment, at the rate of six per centum per annum until paid, from the date of the entry of the said judgment in the special term of the said court, to wit, from the said 18th day of December, 1885, according to the motion aforesaid. A true copy of the entry

of the said judgment as made and directed by the court is hereto attached and referred to as a part of this petition.

The petitioner appeared by counsel in the general term at the hearing of the said motion made in behalf of the said McDade and against the petitioner and resisted the allowance of said motion and the entry of said judgment, and also, at the time the said judgment was drawn up and signed by the presiding justice of the said supreme court of the District of Columbia in general term, counsel for the petitioner in open court objected and excepted to the entry of the said judgment because the same was contrary to law; and the petitioner is advised by counsel and believes that the said supreme court of the District of Columbia was without power or jurisdiction to enter such a judgment against the petitioner in the premises.

The said plaintiff in the court below, the said Lewis H. McDade, now threatens to issue or cause to be issued an execution or writ of *fieri facias* upon the said judgment or judgments and threatens to levy the same upon the property of the petitioner for the purpose of collecting the amount of the original judgment as entered by the special term, together with costs thereon, and also the amount of interest unlawfully ordered and adjudged by the said judgment of the said general term of the said court, and, unless relief shall be granted in the premises to the petitioner, the petitioner believes that such a levy will be made upon its property. The petitioner is ready and willing to pay and has tendered the amount of the said judgment as rendered by the said special term of said court, together with all costs thereon, but the said tender has been refused.

The petitioner is advised by counsel and verily believes that it is without any other remedy, either in law or in equity, and therefore prays that a writ of mandamus may be issued out of and under the seal of this court, directed to the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, and to Alexander

B. Hagner, Walter S. Cox, Charles P. James, Martin V. Montgomery, and Andrew C. Bradley, justices of the said court, commanding and requiring them as follows, to wit:

First. To vacate and cancel the said judgment entered as aforesaid by the said supreme court of the District of Columbia on the 9th day of June, 1890, against this defendant, so far as the same relates to interest upon the said judgment of December 18, 1885, entered as aforesaid by the special term of the supreme court in the said cause.

Second. To enter a judgment upon the mandate of this court in accordance with the terms and directions thereof—that is to say, a judgment affirming the judgment of the general term of the said 28th day of June, 1886, with costs, without more.

Third. That an order may be issued, directed to the said justices of the supreme court of the District of Columbia, requiring them to show cause in this court, at a time to be designated, why they shall not vacate the said judgments entered by the general term on the said 9th day of June, 1890, and enter up judgment according to the terms of the said mandate of this court issued as aforesaid in the said cause of The Washington and Georgetown Railroad Company, plaintiff in error, *vs.* Lewis H. McDade, being cause No. 137 of the docket of this court for the October term, 1889.

Fourth. That an order may be issued by this court, directed to the said justices of the supreme court of the District of Columbia, requiring them to stay and suspend all proceedings upon said judgment in the said supreme court of the District of Columbia and from issuing any writ of *fieri facias* or other execution with a view or for the purpose of collecting the said judgment from this petitioner until the prayer of this petitioner shall have been heard and de-

cided by this court and until the further order and direction of this court. The petitioner hereby offers to give such security by way of supersedeas as may be required by this court in the premises.

Fifth. Or that this court make such other order or grant such other relief in the premises as law and justice may require and to this court shall seem appropriate.

WASHINGTON AND GEORGETOWN
RAILROAD COMPANY,
By C. C. SAILER, *General Supt., &c.*

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

Charles C. Sailer, being first duly sworn, doth depose and say that he is the superintendent of the Washington and Georgetown Railroad Company, the above-named petitioner, and that he is the general manager of its business; that he has read the foregoing petition signed in the name of the said petitioner by him, and that he knows the contents thereof, and that the averments therein contained are true according to his best information, knowledge, and belief.

CHARLES C. SAILER.

Subscribed and sworn to before me this 18th day of June, A. D. 1890.

[SEAL.] HARVEY S. W. DE GAW,
Notary Public.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office in this cause.

Witness my hand and the seal of said court this 12th day of June, 1890.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Mandate. Filed June 9, 1890.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Lewis H. McDade, plaintiff, and The Washington and Georgetown Railroad Company, defendant, at law No. 25023, wherein the judgment of the said supreme court entered in said cause on the 28th day of June, A. D. 1886, is in the following words, viz:

> "This cause having been argued by counsel on both sides and submitted to the court here upon the record of the special term and duly considered by the court, whereupon, because it seems to the court here that there is no error in the record and proceedings or in the judgment of the special term, therefore it is considered that the judgment be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that the plaintiff have execution thereof."

As by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine,

the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs, and that the said plaintiff, Lewis H. McDade, recover against the said defendant for his costs herein expended and have execution therefor.

MAY 19, 1890.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Costs of plaintiff:

Clerk	$	Paid by def't.
Printing record		
Attorney		
	$	

Filed June 9, 1890.

In the Supreme Court of the District of Columbia. In General Term, June 9, 1890.

LEWIS H. MCDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At Law. No. 25023.

This day come again the parties, by their attorneys, and

thereupon the attorneys for the plaintiff present to the court in general term the mandate of the Supreme Court of the United States issued in this cause, affirming the judgment of this court and directing it to proceed to the execution thereof. It is, therefore, this 9th day of June, 1890, considered and ordered by the court that the plaintiff have execution of his judgment against the defendant rendered by the special term, to wit, the sum of six thousand one hundred and ninety-five dollars, with interest thereon from the date thereof until paid, and the costs of this suit incurred by the plaintiff in prosecuting his said suit in this court, to be taxed by the clerk.

By the court:

A. B. HAGNER.

And the defendant, by its counsel, in open court, at the time of the entry of the above judgment, objected to the same and excepted thereto.

ENOCH TOTTEN,
For Defendant.

Filed June 9, 1890.

Supreme Court of the District of Columbia. In General Term, June 9, 1890.

LEWIS H. McDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At Law. No. 25023.

And now comes the said defendant, by its counsel, at the time of the order of the general term directing the judgment in this cause on the mandate of the Supreme Court of the United States, to wit, the 9th day of June, A. D. 1890, and

objects to said judgment and excepts to the same, in open court, at the time of said order.

ENOCH TOTTEN,
Att'y for Def't.

Endorsed: Supreme Court U. S. October Term, 1890. *Ex parte:* In the matter of the Washington & Georgetown R. R. Co., petitioner. Petition for writ of mandamus.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 8, ORIGINAL.

EX PARTE: IN THE MATTER OF THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

RETURN TO RULE.

In the Supreme Court of the District of Columbia, November 13th, 1890.

Ex Parte: In the Matter of the WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Petitioner.

The undersigned, the chief justice and associate justices of the supreme court of the District of Columbia, in answer to the order of the Supreme Court of the United States requiring the undersigned to show cause why a writ of mandamus should not issue, as prayed in the said petition, respectfully state and for cause show—

That by the mandate from the Supreme Court of the United States on the 27th of May, 1890, in the case of Lewis H. McDade *vs.* The Washington and Georgetown Railroad Company, referred to in the said petition, this court was commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, and that the order of this court of the 9th of June, 1890, was passed in said cause because the court, sitting in general term, believed said order was in accordance with right and justice and the laws of the United States.

The reasons of the court in general term for passing the order are stated in the opinion set forth in Exhibit A, annexed to this answer, and which is made part hereof.

All which is respectfully submitted.

E. F. BINGHAM,
Chief Justice.
A. B. HAGNER,
WALTER S. COX,
CHARLES P. JAMES,
M. V. MONTGOMERY,
A. C. BRADLEY,
Associate Justices.

EXHIBIT A.

Supreme Court of the District of Columbia.

HENRY E. WOODBURY
vs.
THE DISTRICT OF COLUMBIA.

LEWIS H. McDADE
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY.

At law. Nos. 23172 and 25023. Decided June 9, 1890.

Justices Hagner, Cox, and James sitting.

Motion by the plaintiffs in these cases to direct the clerk to enter the judgments on the mandates from the Supreme Court, with interest thereon.

Mr. Justice HAGNER delivered the opinion of the court:

In each of these cases a judgment upon verdict was entered in the special term in favor of the plaintiff and sustained by the general term. On writ of error these rulings were confirmed by the Supreme Court of the United States, and on the 19th of May, 1890, a mandate in each case was transmitted to this court reciting that the judgment had been affirmed with costs, and in the usual phraseology commanding that "such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

After the mandates had been filed the plaintiff in each case, by his counsel, made application to this court in general term, representing that he had applied to the clerk to enter the affirmance of the judgment, with interest thereon, and costs, but that the clerk, in consequence of the objection made by the defendants in said judgment, had declined to extend the judgment with interest without the order of the court, and requesting that an order should be given to that effect. The motion was opposed by the counsel of the defendants, who insisted the judgments should be entered without interest—first, because the mandates were silent on the subject of interest; and, second, because interest should never be allowed upon judgments rendered in actions founded on torts like those in the cases before us—McDade's recovery having been for damages sustained by him while working in the shops of the W. & G. R. R. Co. in consequence of its alleged failure to provide safe machinery, and Woodbury having recovered judgment against the District of Columbia for injuries received from falling into an unprotected hole in one of the sidewalks of Washington city.

This court has heretofore expressed its opinion upon the general subject of interest upon judgments, as it was presented to us on several occasions. It is proper to state the points presented and the

rulings made in four reported cases in which the question was considered in different phases.

In District of Columbia *vs.* The Baltimore and Potomac R. R. Co., 1 Mackey, 327, the plaintiff sued to recover the amount it had been compelled to pay to one Barnes on a judgment recovered by him against the municipality for injuries sustained by falling into an unprotected tunnel in process of construction by the railroad company. After affirmance by the Supreme Court the District settled the judgment. In turn the District sued the company for reimbursement of the amount so paid and recovered a verdict for that sum, which was composed of the principal of the Barnes judgment, with costs and interest upon that judgment. On appeal the general term held this interest was properly recoverable by the District, which must have been on the assumption that interest was properly chargeable upon the judgment in tort recovered by Barnes against the District.

In October, 1882, the Supreme Court sent down its mandate in the case of The Fifth Baptist Church *vs.* The B. & P. R. R. Co. (an action in tort), affirming the rulings of the general term. The mandate declared it was "adjudged and ordered by the Supreme Court that the judgment of the general term should be affirmed with costs and interest until paid at the same rate per annum that similar judgments bear in the courts of the District of Columbia." The defendant tendered payment of the judgment and costs without interest, which was refused by the plaintiff; and thereupon the railroad company prayed the general term to order the judgment to be entered satisfied upon payment of the principal of the judgment and costs, without interest. The court, in 2 Mackey, p. 458, held the words in the mandate requiring interest to be paid on the judgment, "at the same rate per annum that similar judgments bear in the courts of the District of Columbia," were not to be understood as indicating a difference in the rule as to giving interest on judgments in tort and judgments on contract, but merely as declaring that the interest in that case was to be at no higher or lower rate than was by law given on judgments in this District. The justice who delivered the opinion of the court proceeded to express his individual opinion that a judgment in tort in this District bears interest from its rendition to its satisfaction.

In 3 Mackey, 501, R. R. Co. *vs.* Hetzel, an action sounding in tort, the general term had entered judgment upon a mandate affirming the ruling of this court, with interest from the date of the original judgment. The mandate was silent in that case as to interest. After the entry of the judgment here the railroad company made a motion to strike out the entry of interest upon the same grounds relied on in the present application, and also filed a bill in equity substantially presenting the same objections. The general term overruled the application, Chief Justice Cartter delivering the opinion, which concluded as follows:

"We do not have to decide in this hearing whether a judgment in tort carries interest in this District. Ordinarily a judgment in tort does not carry interest; still there are indications in our statutes

that it does. We had that subject under consideration in Baptist Church *vs.* B. & P. R. R. Co., 2 Mackey, 458, and though it was not necessary to decide it, and we made no decision, we were all of the opinion that such ought to be the law. It certainly is justice in the present case that interest should follow. The question came up when we entered the judgment on the mandate. There was nothing irregular about the entry of judgment, and it is now too late to reverse or alter it."

In Hellen *vs.* Metropolitan Railroad Company, 4 Mackey, 519, which was an action in tort for injury to the plaintiff from having been run over by one of defendant's cars, judgment was rendered in the circuit court for $1,500, with interest from the date of its rendition. The defendant objected to the allowance upon the ground that judgments in tort do not bear interest in this District, and the question was certified to the court in general term to be heard in the first instance. The foregoing cases and the provisions of the Revised Statutes were cited, and after argument by both sides the opinion of the court was announced in these words:

"We do not doubt that judgments founded in tort, like those based on actions *ex contractu*, bear interest in this jurisdiction from the date of rendition. The objection is, therefore, overruled."

In these cases six of the justices of the court have participated, viz., Chief Justice Cartter and Justices Wylie, Cox, James, Merrick, and myself. The result of these decisions appeared to have settled the practice of this court in favor of the contention of the plaintiff; but we have proceeded, nevertheless, to re-examine the question and will give the reasons why we think those decisions were correct and should be sustained.

In 1870 Congress undertook to legislate upon a subject at that time much agitated, namely, whether persons should be allowed by law to contract for a higher rate of interest than that then in existence in the District, and the act of the 29th of April of that year, ch. 59, was passed as a comprehensive statute disposing definitely of the entire subject. Some of its provisions were new, and the others expressed the existing law. Section 713, as it now appears in the revision, partakes of both features. So much as relates to interest upon decrees was new legislation. The rest was but a declaration of the law then prevailing in the District; but as to both judgments and decrees there was a positive declaration of the law-making power that "the rate of interest upon judgments or decrees and upon the loan or forbearance of any money, goods, or things in action shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum or for a longer or shorter time, except as provided in this chapter."

Congress had the right to pass such a law, and its provisions are as binding as those of any other constitutional statute. There is no more discrimination expressed as to the origin of the judgments and decrees which thenceforth were to bear six per cent. interest than there is with respect to the nature of the other money obligations comprehended in the enumeration. In the latter case, whether the indebtedness was in fact the settlement for some wrong in-

flicted by the debtor upon the creditor or was an ordinary loan of money, the interest was equally to be reckoned upon the amount; and there is nothing more in the act to indicate that judgments or decrees that might have had their origin in actions in tort were to be excluded from the law than that such judgments and decrees as had their origin in contracts should be excluded. The words are general and must be held to comprehend all judgments and decrees, whether of one description or the other. In the face of such plain and comprehensive language there remains no room for construction, and the courts have no right to make a discrimination between judgments of different origin which the Legislature had refused to make. If the statute means what it says it confers rights on parties which must be recognized and which the courts are powerless to take away.

A judgment rendered in an action in tort may become the subject of a decree in equity, subjecting the debtor's property interests to its operation. Could it be successfully contended that a decree setting aside a defendant's deed as fraudulent and ordering a sale of the property to pay a judgment or directing his equitable interest therein to be sold to satisfy a judgment against a party should not bear interest because the judgment which it is sought to enforce had been recovered in an aggravated action of tort and the wrong-doer had endeavored to defraud the injured plaintiff by conveying away all his property, and thus rendering a decree in chancery necessary to obtain payment? The reply would be that Congress had declared that interest upon decrees shall be at the rate of six per cent., not upon some decrees but upon decrees generally, and hence that such a decree, properly bore interest; and since interest would go upon such a decree, why should it not equally be given upon the judgment itself?

But it is argued that originally interest was never computed upon judgments in tort, and therefore the language of this statute should be construed as not applicable to that class of judgments; but it was surely competent for Congress to alter such a rule; and if words adequate to accomplish such change are used the courts have no right to limit their effect, because to give full force to the language would recognize a change from the former rule or, in other words, would accomplish what Congress intended.

It is true interest at common law did not run upon judgments in tort; neither was interest allowed at common law upon judgments of any description. It required the enactment of a second statute in the reign of Henry VII to compel the courts to enforce a prior law of the same reign, which had authorized the successful plaintiff on a writ of error "to recover his costs and damages for his delay and wrongful vexation" resulting from the defendant suing out the writ. Until the statute of Henry VIII, legalizing the reception of interest by people in general as well as by Jews, the courts were naturally reluctant to resort to the addition of interest to judgments under the name of "damages;" but after the almost inveterate prejudice against the reception of interest had disappeared under the influence of legislation and more enlightened opinion, the courts

determined to enforce the statutes of Henry VII by requiring the defendant to pay interest on the judgment, to be added to the costs by way of damages. (2 Sellon's Practice, 446.) The statutes of Henry VII made no discrimination as to whether the judgments referred should be rendered in actions in tort or in actions *ex contractu*. Both these statutes were in force in Maryland at the organization of this district. (Kilty's Report on the Statutes, 128, 230.) See Hook *vs.* Boteler, 3 H. & McH., 348, where the general court in 1793, in an action to recover money lost at gaming, gave judgment for the amount, "£120, current money, damages and costs."

In 1781 it had been decided by Lord Mansfield Douglass, 721, Zinck *vs.* Langton, that interest should be the measure of the damages mentioned in the statutes of Henry VII, and a similar ruling was made by Justice Buller in Entwistle *vs.* Shepherd, 2 Term Rep., 70, in an action on a judgment in 1787. A few years after these decisions the judiciary act of 1789, ch. 20, was passed, and by sec. 23 (now sec. 1010 of the Revised Statutes of the United States) it was declared: "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay and single or double costs at its discretion." The supreme court construed this statute in accordance with the practice established by the English courts a few years previously, and in 1803 passed a rule, No. 17, declaring that the "damages" should be awarded by an allowance of interest at six per centum upon the judgment when it appeared there was a real controversy; and by rule 18 it allowed interest at ten per centum by way of damages when it appeared the appeal was taken merely for delay. In the case of Mitchell *vs.* Harmony, 13 Howard, 115, at December term, 1857, which was an appeal from the circuit court in New York, the supreme court affirmed the judgment below and awarded interest at six per cent. under these rules. An application was made to the court to allow the plaintiff interest at the rate of seven per cent., the legal rate in the State of New York, but the court denied the application, as rule 17 was still in force, and limited the interest to six per cent; but at the close of that term the rule was modified, and rule 62 was passed, which declared that interest should be levied from the date of the judgment until paid "at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered," and that the same rate should apply to decrees unless otherwise ordered. The present rule, No. 23, embodies the same provisions.

In 1852 the Supreme Court had affirmed a judgment from the circuit court of the southern district of Mississippi in the case of Perkins *vs.* Fourniquet, 14 Howard, 313, with costs and damages at the rate of six per cent. per annum, and a mandate issued reciting the judgment and directing it to be carried into execution. An execution was issued from the Mississippi court commanding the marshal to levy the amount of the original judgment with the Mississippi interest of eight per cent., together with the damages referred to in the mandate of six per cent. interest, making together interest at fourteen per cent. upon the judgment. At the next term the supreme

court held that as the amended rule had not then been passed the interest collectible upon the judgment by way of damages was limited to the six per cent. named in the mandate. The court took occasion to say that the mandate in this case and that in Mitchell *vs.* Harmony were in the usual form—the same that had been used since the adoption of the rules in 1803. (14 Howard, 336.)

These cases show that the modification of rule 17 to the form of the present rule No. 23 was made with no intention of discriminating between different kinds of judgments, but was merely designed to accommodate the rate of interest allowed by way of damages on affirmance to the different rates of interest then prevailing in the several States. If a uniform rate of six per cent. were retained, the judgment creditor in New York or other States where a higher rate of interest existed would not be indemnified for the delay incident to the appeal, and hence the provision that the rate should be regulated by the prevailing rate in the State where the judgment was recovered was reasonable and just.

Neither the act of 1789 nor either of the rules of the Supreme Court made any discrimination between the different kinds of judgments as to the allowance of interest.

The case of Mitchell *vs.* Harmony, 13 How., 115, before referred to, was an action in trespass by the plaintiff to recover damages for the seizure of his property in New Mexico by officers of the United States army during the Mexican war, which would certainly seem to possess the characteristics of an action in tort, but the supreme court on affirming the judgment rendered for the plaintiff below allowed interest at six per cent. from its rendition, amounting to $8,700, by way of damages.

Sec. 966 of the Revised Statutes (Aug. 23, 1842) declares that "Interest shall be allowed on all judgments in civil causes recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon in all cases where by the law of the State in which such court is held interest may be levied under process of execution on judgments recovered in the courts of such State, and it shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the courts of such State."

If this provision is applicable to the District of Columbia it is conclusive of the right to compute interest upon all judgments rendered in the courts of the District. The allowance of interest is to be made on all judgments in civil cases, and certainly a judgment in an action of tort is obtained in a civil cause.

It is true the section speaks of circuit and district courts and of the laws of the State in which said courts may be held, but our system includes by name courts with those designations, and we exercise all the jurisdiction of circuit and district courts of the United States in addition to that given by the adoption of the Maryland laws and by special acts of Congress. Though the District of Columbia is without the autonomy of the States, it has yet been recognized as a State in the sense of being a separate political community (14 Peters, Bank *vs.* Dyer), and the expression "States of the

Union," used in a treaty, has been held to include the District of Columbia. 133 U. S., 270, Geffroy *vs.* Riggs. No good reason can be assigned why this section should not be held to apply to the courts of our system in this District, a construction which the people of the country generally are as much interested in having sustained as those resident here.

The Supreme Court has repeatedly treated the section as applicable here by inserting in its mandates the statement (taken from its rules, founded upon section 966) that the judgment has been "affirmed with costs, and interest at the same rate per annum that similar judgments bear in the courts of the District of Columbia." Such was the form of the mandate in Baptist Church *vs.* Railroad Company, 2 Mackey, 458. The same language was used in the mandate sent down in October, 1875, in the case of the B. & P. Railroad *vs.* Trustees Sixth Presbyterian Church, which was not an action *ex contractu*, but a judgment given upon an inquisition of damages for injury to their property by the laying of the railroad tracks in front of the church, and in the mandate in the case of Beall and Wife *vs.* B. & O. R. R. Co., an action to recover for injuries to the wife, which was sent down in May, 1879. Doubtless a search would disclose many similar mandates.

Of course none were sent in the cases in tort where the appeals were dismissed for want of jurisdiction, as in Grant's case (98 U. S.), where the judgment in November, 1875, in the general term, was for $2,000, "with interest thereon from the date of the verdict in the special term, 22 March, 1875."

But if sec. 966 should be held to be not applicable to the District this general declaration of the sense of Congress, that justice requires interest to be allowed on all judgments, would certainly conduce to support the view we take of the plain provisions of section 713 of the Revised Statutes of the District, that all judgments and decrees shall continue to bear interest at the rate of six per cent.

The language of section 997, article "justice of the peace," of the Revised Statutes of the District of Columbia, is in consonance with this view.

It declares that "justices of the peace shall have jurisdiction in all cases where the amount claimed to be due for debt or damages arising out of contracts, express or implied, or damages for wrongs or injuries to persons or property does not exceed $100, except in cases involving the title to real estate, actions to recover damages for assault," etc. Section 1007 of the same article declares that "judgments shall bear interest from their date until paid or satisfied." This, of course, must be held to comprehend all judgments that can be rendered by justices of the peace within the jurisdiction conferred on them by section 997, including judgments in tort. Can it be supposed that Congress intended to allow interest upon judgments in tort rendered by justices of the peace and to deny its allowance upon judgments of the same description rendered by the supreme court of the District in the same jurisdiction?

Again, a justice of the peace gives judgment for the plaintiff in a case before him on which interest goes under section 1010 for

damages in an action of tort. An appeal is taken to this court under the law, and the plaintiff again succeeds. Can it be that the new judgment, which becomes a judgment of this court, shall not bear interest because sounding in tort, in the face of the provisions of section 1010? As was said in 2 Mackey, 465, "we should expect to find symmetry rather than needless disagreement in essential parts of the same system.

We have examined the earliest attainable records of this court as far back as 1803, and find the judgments in actions of contract were entered for a principal sum, with interest thereon.

But in 1812 Congress passed a law (Revised Statutes District of Columbia, sec. 829), which declared: "Upon all judgments rendered on the common-law side of the court in actions founded on contracts interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury in this cause." The provision expressed in the last member of the section was an innovation on the previous practice. The new rule, however just and appropriate to actions on contract, would have been entirely inapplicable to actions in tort. In the former the jury decides that at a designated day before the suit was brought a certain sum was due or payable to the plaintiff, and they could therefore fix the date from which interest should be charged on the sum thus improperly withheld, and in calculating interest on the judgment to be entered on their verdict it was henceforth allowed to be reckoned from the day "ascertained" by the jury, instead of charging it only from the date of the judgment, as previously.

But different considerations necessarily applied to verdicts in tort, and the new law properly omitted them from its operation. In such cases the jury could name no previous day at which the damages they were to find could be considered as properly payable, and they could only return such specific sum as in their opinion should justly be recovered as of the day of the verdict. When the verdict was rendered for that sum the judgment was entered for the amount, and interest was only chargeable on the judgment from that day. The omission of judgments in tort from the operation of this act had, therefore, no bearing upon the question whether interest should be given upon judgments in such cases and was not designed to change the existing practice in that respect. But if such had been the effect of the act of 1812 the subsequent legislation of 1870 (sec. 713) would have nullified the distinction when it provided that all judgments should continue to bear interest at 6 per cent.

From the early days of this court there have existed rules for the guidance of the clerk for entering verdicts and judgments. The publication in 1869 contained the same language on this subject as is used in rule 51, in the edition of 1886:

"A general verdict for the plaintiff shall be recorded thus: 'The jury, on their oath, say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of $—, besides costs.' If the action

be founded on contract the record of the verdict shall proceed, 'with lawful interest from the — day of ——, besides costs.'"

Rule 67 gives the form in which judgment shall be entered upon verdict as follows:

"Whatever the form of action may be, if the judgment be for the recovery of money, it shall be awarded generally without any distinction of debt from damages, thus: 'It is considered that the plaintiff recover against the defendant $—, with interest as aforesaid, being the money payable by him to the plaintiff by reason of the premises, and $— for his costs of suit, and that he have execution therefor.'"

But for the act of 1812 the old form of extending judgment in cases of trespass would probably have continued, as shown in 2 Harris Entries, 87 and 148, where the verdict names the damages found by the jury, and the memorandum attached, called the release, states that judgment was rendered for the damages laid in the declaration and costs of suit, the said damages to be released upon the payment of the sum of $—, with interest thereon from — until paid, and costs.' We again call attention to the fact that the statutes 3 Henry VII, ch. 10, and 19 Henry VII, ch. 20, which declared that the person whose judgment shall be affirmed on writ of error 'shall recover his costs and damages for his delay and wrongful vexation in the same," make no distinction between judgments rendered on contracts and those in tort. Certainly there can be no reason in public policy or justice why interest by way of damages should not equally be allowed in the latter class of cases, and any such distinction would be merely artificial. Indeed, there seems to be more hardship in withholding interest in such recoveries than there could be in judgments on contract. The suitors in such actions are generally needy and less able to bear the consequences of being "delayed of their execution to their great and importable hurt, loss, and charges" (in the words of the latter statute) than merchants, who may be supposed to have reckoned the chances of such delays in their prices. Such a judgment creditor, who has been maimed for life or whose daughter may have been debauched or property taken from him by a wealthy defendant, should certainly, in justice, be allowed some indemnification where appeals are taken "to the intent only to delay execution of the said judgment." To pay him only the principal of the judgment after he has followed the defendant into every court accessible to him and been obliged at last to institute proceedings to set aside conveyances contrived to cheat him out of his recovery might be but to give him but a barren victory as disastrous as a defeat.

But it is earnestly insisted by the counsel of the defendants that in the recent case of Keller *vs.* Ashford, 133 U. S., 617, the Supreme Court has declared that a judgment rendered in an action sounding in tort bears no interest. We have examined the case carefully, and we cannot think the court could have intended to assert that general proposition. In that case Keller filed a bill to subject Ashford's land to the payment of a mortgage note for $2,000, made 21st February, 1876, bearing interest at eight per cent. yearly until paid. The equity court dismissed the bill and this decree was affirmed by

this court in general term. An appeal was taken to the Supreme Court of the United States, and the defendant there moved to dismiss the appeal because the amount involved was beneath the jurisdiction. The atatute then applicable regulating the right of appeal in the District of Columbia limited it to cases "where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars." The point whether interest should be computed on a judgment or decree after it had been entered was not involved and was entirely immaterial to the inquiry. The sole question before the court on this motion was whether the matter in dispute did exceed the prescribed limit, and that depended upon the query whether the decree itself might properly declare that interest upon the note should be calculated from its maturity and thus make that interest part of the decree itself. In deciding this question the court said: "In a suit founded upon contract the sum in dispute at the time of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction;" and in support of this position reference is made to four cases, one of which (New York Elevated Railroad *vs.* Fifth National Bank, 108 U. S., 698) was not founded upon contract, but was an action brought by the bank to recover damages for injuries caused by the construction of the railroad in front of the plaintiff's real estate.

The opinion proceeds: "By the express terms of the promissory note sued on in this case it bore interest at the rate of eight per cent. yearly from its date until paid. Computing interest accordingly, the sum in dispute was much more than $2,500 at the time of the decree in general term, which was the decree from which this appeal was taken."

These sentences contain the decision upon the only question involved in the motion, and the head-note of the report properly limits their scope to that point.

But the counsel for the defendant in that case, in arguing that "the matter in dispute" at the time of the decree appealed from did not exceed the value of $2,500, had cited two decisions oft he Supreme Court having no applicability to the question really involved in the case, but relating to the other and different inquiry, whether interest upon the judgments in those cases after they had been entered could be added to swell the matter in dispute to the appealable limit. However this last point might have been decided in those cases, they could not bear upon the real question before the court in Ashford's case, which, as we have seen, was not whether a judgment or decree should bear interest after it had been entered, but whether the decree to be given in that case should have included interest upon the mortgage notes.

The Supreme Court, however, without noticing this distinction, disposed of these citations in this sentence: "In Railroad Company *vs.* Trook, 100 U. S., 112, cited for the appellee, as in District of Columbia *vs.* Gannon, 130 U. S., 127, the judgment in special term was for damages in an action sounding in tort, which bore no interest, either by the general law or by the judgment of affirmance in general term."

An examination of those cases will show that we have correctly described their scope and import.

Trook's case was an action by a lot-holder in Washington against the railroad company to recover damages for its improper use of a public street, which he alleged caused an injury to his property—like the case of N. Y. Elevated Railroad *vs.* Fifth Avenue Bank, 135 U. S., before referred to. The judgment below was reduced by a remittitur and affirmed by the general term for $2,500. In the Supreme Court the plaintiff moved to dismiss the appeal because the matter in dispute did not exceed $2,500, and the motion was allowed. The Chief Justice makes no reference to thenature of the action, but uses language that would be applicable to any suit, whether on contract or in tort. The brief opinion is as follows: "In cases brought here by writ of error for the re-examination of judgments of affirmance in the supreme court of the District of Columbia the value of the matter is determined by the judgment affirmed without adding interest or costs. The judgment in this case after the $1,500 had been remitted to avoid a new trial did not exceed $2,500. Such being the case, under the rule established in Railroad Co. *vs.* Grant, 98 U. S., 398, our jurisdiction has been taken away."

There is not a word in this opinion to intimate that the decision was based upon the character of the action. The Chief Justice speaks of "cases" generally brought on appeal and of interest in such cases on the judgment affirmed without reference to the form of action in which the judgment was rendered.

In the Gannon case the plaintiff recovered judgment for $5,000 for personal injuries sustained by reason of a defect in a paved street, which was affirmed in the general term by an order saying nothing about interest, and an appeal was taken to the Supreme Court. There a motion was made by the plaintiff below to dismiss, upon the ground that the matter in dispute did not exceed $5,000, the limit of jurisdiction under the act of March 3, 1885. Chief Justice Waite, in his opinion allowing the motion, quotes from the opinion in Trook's case, that "the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs," and refers to other cases, including N. Y. Elevated R. R. *vs.* Fifth Avenue Bank. He then says: "Where interest, instead of accompanying the judgment or decree as damages for the detention of a specific amount adjudged or decreed, is part of the claim litigated, and the judgment or decree is so framed as to provide for it to run from a period antecedent to the rendition of such judgment or decree, or in actions *ex contractu*, according to the terms of the contract upon which the action is based, jurisdiction may attach."

"This result would have followed here if, by the judgment of affirmance, interest had been directed to be added to the judgment at special term. As it is, however, the judgment falls below the amount necessary to give us jurisdiction." While this seems to be an authority to sustain the ruling on the real question in Ashford's case, we can discover nothing in it indicating that the order overruling the motion to dismiss was based upon the idea that interest was not to be allowed upon judgments in tort. On the contrary,

the Chief Justice plainly intimates that the general term had the right to direct interest to be added to the judgment, notwithstanding it was apparent it had been rendered for damages sounding in tort. This language seems quite inconsistent with the intimation in the sentence we have been considering, that judgments for damages sounding in tort bear no interest "by the general law;" and it seems plainly inconsistent with the language of the law in section 966 of the Revised Statutes, which distinctly says that "interest shall be allowed on all judgments in civil causes recovered in a circuit or district court," a provision under which the circuit courts and the Supreme Court have recognized that the section applies to other actions besides those *ex contractu*, as in New York Elevated R. R. *vs.* Fifth National Bank.

We cannot, therefore, suppose the observation made by the learned justice in the opinion in Ashford's case, in denying the authority of the two cases cited in the argument, could have been intended to express the opinion of the Supreme Court upon the important question we are now considering.

But, however this may be, it is manifest the observation was beyond the question under consideration and "not essential to the decision," and we have the authority of the Supreme Court, reiterated in the recent case in the same volume (133 U. S., 503, Wisco. R. R. Co. *vs.* Pierce County), to consider it as *obiter dictum*. In that case the court repudiated the construction that had been given to one of its previous decisions by the General Land Office ever since its announcement thirteen years before; and, replying to the argument that the practice thus followed for that length of time by the Government officers should not be disturbed, in its opinion, delivered by Mr. Justice Field, said:

"After the decision of the court in the Leavenworth case the Land Department changed its practice, and refused to allow the deficiencies arising from sales or other disposition made or from the attachment of pre-emption or homestead rights before the date of the act to be made up from selections within the indemnity limits; but that decision did not warrant the change. The question in that case was not for what deficiencies indemnity could be had, but what lands could be taken for deficiencies which existed. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was a mere dictum, not essential to the decision, and therefore not authoritative and binding."

That the mandates from the Supreme Court omitted to direct the affirmed judgments should bear interest cannot operate to deprive the plaintiffs of interest if it is secured to them by law. In Amiss *vs.* Smith, 16 Peters, 311, the Supreme Court said: "We can see no good reason why interest upon a judgment that is secured by positive law is not as much a part of the judgment as if expressed in it. The Legislature says 'all judgments shall bear interest at the rate of 8 per cent.' Can the judgment be satisfied without paying the interest?" And, in Perkins *vs.* Fourinquet, 14 Howard, 331, the court said: "In such cases the judgment bears interest by force

of the law, although upon the face of it it may not purport to carry interest."

But if the omission of the allowance from the mandate shall embarrass the plaintiff's right the Supreme Court would not hesitate to amend the judgment on motion, as was ordered by Chief Justice Marshall in Bank of Kentucky *vs.* Wistar, 3 Peters, 432.

The contemporaneous appropriation by Congress during the years in which several of these damage suits were recovered against the District of Columbia is not without significance as a kind of legislative construction of the statutes we have been examining.

In 25 Statutes at Large, p. 7 (acts of 1888), appropriation is made of $7,604 to pay several enumerated judgments against the District, among which is that of John P. Larman for $3,000 damages recovered for injuries suffered from a fall into an unguarded area, "together with a further sum to pay the interest of said judgments from the date the same became due until the day of their payment." On page 371 of the same volume is another appropriation of $9,000 to pay other enumerated judgments against the District, together with a further sum to pay interest upon them. So, on page 913, $1,894 is appropriated to pay similar judgments, together with a further sum to pay interest on the judgments, one of which, that of Edwin Muller, was recovered in an action for damages for alleged negligence.

So, in vol. 24, p. 264 (1886), a like appropriation of $16,700 was made to pay similar judgments, "including interest and costs." The names of the creditors are not given in this act, but from our experience of suits against the District it may be fairly assumed that part of them at least were rendered in actions not *ex contractu;* and in the Gannon suit, which was quoted to the court in Ashford's case to show that interest could not be allowed in such an action, Congress appropriated money (payable, as the other moneys were, equally by the Government and the District) for the principal and interest on that claim.

We have examined this question with care, and, being satisfied the practice of this court was right, we shall pass an order directing the clerk, in entering the judgments on the mandates, to allow interest from their respectives dates in the circuit court.

(Endorsed:) Supreme Court U. S. 1890, October term. No. 8, original. *Ex parte:* In the matter of The Washington & Georgetown R. R. Co., petitioner. Return to rule to show cause. Filed Nov. 15, 1890. James H. McKenney, clerk.